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INDIANA LAW REVIEW

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Indiana Law Review

Volume 9

1975-1976

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Indiana Law Review

Volume 9

1975

Number 1

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Survey of Recent Developments in Indiana Law

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Survey of Recent Developments in Indiana Law

The staff of the *Indiana Law Review* is pleased to publish its third annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1974, through May 31, 1975. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Justice of the Peace Reform: The Legislative Response

Stephen C. Daniel*

In the foreword to last year's *Survey of Recent Developments in Indiana Law*, Mr. David Campbell discussed the need for reform in Indiana's system of courts of limited jurisdiction.¹ The members of the 99th General Assembly recently addressed that problem and offered as their solution what has come to be known as the County Court Law.² The law provides for county courts to serve sixty-two counties,³ for small claims dockets to be created

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¹Campbell, *Foreword: Indiana Justice of the Peace Courts—Problems and Alternatives for Reform*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 1 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

²IND. CODE §§ 33-10.5-1-1 to -8-6 (Burns Supp. 1975).

³*Id.* §§ 33-10.5-2-1(a), -2. Lake County receives three county courts, and two courts each are created in Delaware, Elkhart, LaPorte, Madison, and Vigo counties. The following counties have one county court: Bartholomew, Boone, Cass, Clark, Clinton, Dearborn, Decatur, DeKalb, Fayette, Floyd, Grant, Hamilton, Hancock, Hendricks, Henry, Howard, Huntington, Jackson, Jefferson, Johnson, Knox, Kosciusko, Lawrence, Marshall, Miami, Monroe, Montgomery, Morgan, Porter, Rush, Shelby, Tippecanoe, Wabash, and Wayne. Joint circuits were created in the counties of Clay-Putnam, Dubois-Martin,

in the circuit courts of twenty-five counties,⁴ and for each of two counties to be served by a small claims and misdemeanor division of their unified superior court.⁵ The remaining three Indiana counties were the subject of separate legislative action.⁶

For several years the question of reforming minor courts has generated considerable debate in Indiana. The various factions were widely divided in their philosophical views of how the "best system" should be organized.⁷ The final result of the General Assembly's action is probably totally pleasing to no one who expended time and energy in the struggle for change, but the consensus of opinion seems to be that the final compromise solution is workable.

A. Legislative History

The session began with several alternative court reform pro-

Greene-Sullivan, Harrison-Crawford, Lagrange-Steuben, Ohio-Switzerland, Posey-Gibson, Randolph-Jay, Wells-Adams, White-Jasper, and Whitley-Noble.

⁴*Id.* §§ 33-4-1-4.1 *et seq.* The following counties are affected: Benton, Blackford, Brown, Carroll, Daviess, Fountain, Franklin, Fulton, Jennings, Newton, Orange, Owen, Parke, Perry, Pike, Pulaski, Ripley, Scott, Spencer, Starke, Tipton, Union, Vermillion, Warren, and Washington.

⁵*Id.* § 33-10.5-2-1(b). Small claims dockets are created in the unified superior court of Allen and St. Joseph Counties. Two additional judges are provided for each of these courts. *Id.* § 33-10.5-2-2.

⁶Marion County will be served by a modification of the current justice of the peace system. IND. CODE §§ 33-11.6-1-1 to -7 (Burns Supp. 1975). The present nonattorney justices are retained in office by means of a "grandfather clause;" however, the law provides that anyone who replaces them must be admitted to the practice of law in Indiana. *Id.* §§ 33-11.6-3-2, -3. The courts are given civil jurisdiction in cases where the claim is \$1,500 or less, but they will have no criminal jurisdiction. *Id.* §§ 33-11.6-4-2, -3. All appeals will be by trial de novo to the circuit or superior courts. *Id.* § 33-11.6-4-14. A superior court is created in Warrick County and a small claims and misdemeanor division is established therein. *Id.* §§ 33-5-45.5-1, -14. The first judge for the court will be elected in November, 1976. *Id.* § 33-5-45.5-11. The terms of the justices of the peace in Warrick County are therefore extended until December 31, 1976. *Id.* § 33-5-45.5-24(a). Prior law had extended justice of the peace courts only until January 1, 1976. *Id.* § 33-11-21-2 (Burns 1975). A small claims division with a misdemeanor docket will be established in the Vanderburgh Superior Court. *Id.* §§ 33-5-43.1-1, -3 (Burns Supp. 1975). One or more judges will be appointed for that court. *Id.* § 33-5-43.1-2.

⁷During the legislative hearings on minor court reform, many members of the General Assembly expressed the viewpoint that the best alternative would be an upgrading of the present justice of the peace system. They reasoned that the present system of over four hundred courts provided geographical convenience and that nonattorney judges were capable of dispensing "common sense" justice regardless of the fact that most of the justices had undergone little or no legal training. For a discussion of the lack of legal training among justices see STAFF OF INDIANA JUDICIAL STUDY COMM'N, REPORT No. 2—JUSTICE OF THE PEACE SYSTEM (1974). See 1974 Sur-

posals being introduced for consideration. At opposite extremes were a bill simply to extend the present justice of the peace system⁸ and another to create a statewide system of county courts.⁹ The latter proposal was almost identical to one that had succeeded in winning Senate approval during both sessions of the 98th General Assembly,¹⁰ but on each occasion it was subsequently defeated in the House.¹¹ In the middle ground were House and Senate proposals for creating a docket-commissioner system in the existing circuit courts.¹² The House proposal had been drafted by a joint interim study group. After certain amendments it was approved by the House Courts and Criminal Code Committee and passed on for action on the floor.¹³ However, the bill was never handed down for second reading. Thereafter, the House initiated no other proposals for small claims court reform.

Meanwhile, the Senate's docket-commissioner proposal was stripped in committee, and the first draft of the legislation which would eventually become the County Court Law was inserted in its place. The bill was primarily a combination of the county court and docket-commissioner systems. The compromise bill passed the Senate.¹⁴ The House amended it to provide that a non-attorney could serve as judge so long as that person could qualify for the office by passing a special examination to be administered

vey of Indiana Law 7-11 (the merits of suggested alternatives to the justice of the peace system).

⁸Ind. H.R. 1046, 99th Gen. Assembly, 1st Sess. (1975). H.R. 1046 would have extended the offices of justice of the peace and all laws relating thereto until December 31, 1975. See *1974 Survey of Indiana Law* 3-7 for criticism of justice of the peace courts.

⁹Ind. S. 389, 99th Gen. Assembly, 1st Sess. (1975).

¹⁰Ind. S. 40, 98th Gen. Assembly, 1st Sess. (1973), 1973 IND. S. JOUR. 1183; Ind. H.R. 1065, 98th Gen. Assembly, 2d Sess. (1974), 1974 IND. S. JOUR. 694. Had either of these proposals passed, they would have created a system of independent county courts to hear small claims, traffic, and misdemeanor cases. Every county at least would have shared a county court.

¹¹Ind. S. 40, 98th Gen. Assembly, 1st Sess. (1973), was referred to the House Courts and Criminal Code Committee and was never reported out for second reading. 1974 IND. H.R. JOUR. 985. Ind. H.R. 1065 (1974) was defeated when the House failed to concur in amendments added by the Senate. 1974 IND. H.R. JOUR. 570.

¹²Ind. S. 441, 99th Gen. Assembly, 1st Sess. (1975); Ind. H.R. 1264, 99th Gen. Assembly, 1st Sess. (1975). These proposals would not have created new independent courts, but would have established a small claims and misdemeanor docket for each existing circuit court. The circuit judge would have been empowered to hire a full or part-time employee to hear the cases filed on the docket.

¹³1975 IND. H.R. JOUR. 286. The committee report was adopted by the House, and this was the last action taken on H.R. 1246.

¹⁴1975 IND. S. JOUR. 445.

by the Indiana Supreme Court.¹⁵ The Senate then dissented to the House amendments, and it was therefore necessary to appoint a conference committee.¹⁶ Following a series of meetings, the Senate again passed the bill;¹⁷ however, the bill failed in the House,¹⁸ primarily because of objections to a provision which would have abolished all city courts as of December 31, 1975.¹⁹ The bill was again sent to a conference committee,²⁰ which amended it to provide for the extension of all city courts until December 31, 1979.²¹ The one exception to this provision was that city courts in second-class cities in Lake County would continue to exist until the General Assembly provided otherwise.²² Both chambers passed the final draft of the bill in the closing days of the session,²³ and Governor Bowen subsequently signed it into law.

B. Jurisdiction and Procedure

As previously noted, the bulk of Indiana's counties will be served by independent county courts. The County Court Law provides for the creation of these courts and the method and form of their operation. The county courts are granted original and concurrent jurisdiction in civil cases founded on contract or tort where the amount in controversy does not exceed \$3,000 and in possessory actions between landlord and tenant where the monthly rental payment does not exceed \$500.²⁴ The county courts also have criminal jurisdiction where the minimum statutory penalty does not exceed one year of imprisonment, a \$1,000 fine, or both.²⁵

¹⁵The nonattorney testing provision was ultimately retained in the final draft of the bill. IND. CODE § 33-10.5-4-1 (Burns Supp. 1975). After this amendment the bill was passed by the House. 1975 IND. H.R. JOUR. 863.

¹⁶1975 IND. S. JOUR. 866. The Senate conferees were Senator Benjamin of District 4 (Lake County) and Senator Edwards of District 28 (Hancock, Henry, and Madison Counties). 1975 IND. H.R. JOUR. 932. The House conferees were Representative Arnold of District 7 (LaPorte and St. Joseph Counties) and Representative Jones of District 43 (Marion County).

¹⁷1975 IND. S. JOUR. 919, 939.

¹⁸1975 IND. H.R. JOUR. 975.

¹⁹The floor debate of the Indiana House and Senate is not recorded, but the author was present during debate on the conference committee report and almost all arguments against adoption concerned the fact that city courts should be retained for one more term as a transition measure in case the county court system could not immediately handle all of the cases within its jurisdiction.

²⁰1975 IND. H.R. JOUR. 1004. The conferees were the same as those listed in note 16 *supra*.

²¹Ind. Pub. L. No. 305, § 55(a) (May 5, 1975).

²²*Id.* at § 55(b).

²³1975 IND. S. JOUR. 996; 1975 IND. H.R. JOUR. 1017.

²⁴IND. CODE § 33-10.5-3-1 (Burns Supp. 1975).

²⁵*Id.*

The county court is specifically denied jurisdiction in matters involving divorce, paternity, probate, juveniles, partition of real estate, and appointment of receivers; but it may conduct preliminary hearings in felony cases.²⁶

All causes filed in the county court will be assigned to one of three dockets: (1) A small claims docket for civil cases in which the amount claimed does not exceed \$1,500, (2) a plenary docket for civil cases above \$1,500 but not more than \$3,000, and (3) a criminal docket for all traffic and misdemeanor cases.²⁷ Cases assigned to the small claims dockets will be subject to relaxed rules of procedure and evidence, which will hopefully allow a litigant to present his or her case without the assistance of legal counsel.²⁸ The filing fee on the small claims docket will be \$10, and this amount will include the cost of service of process by registered mail. The plenary docket costs will be the same as the amount provided by statute for filing a civil claim in circuit court.²⁹

In order to simplify and expedite the processing of cases involving violations of motor vehicle laws, the new act establishes a traffic violations bureau to operate in conjunction with each county court.³⁰ For the convenience of the arresting officer and the defendant, the law provides that such bureaus may be located in various places throughout the counties.³¹ The majority of offenses will be administered by allowing an alleged offender to enter a guilty plea with the violations clerk and pay a predetermined amount of fine and costs.³² Anyone who has been convicted of or pled guilty to another violation within the previous 12-month period will still be obligated to appear in court.³³ Likewise, a person charged with certain enumerated offenses, such as driving without a license, exceeding the speed limit by more

²⁶*Id.* § 33-10.5-3-2.

²⁷*Id.* § 33-10.5-7-1.

²⁸*Id.* § 33-10.5-7-2. *Id.* § 34-1-60-1 (Burns 1973) provides that corporations must appear by attorney in all cases. Public Law 305 section 51 mandates the Indiana Judicial Study Commission to prepare and publish model rules of small claims procedure by January 1, 1977. Section 51 further provides that these may be submitted to the Indiana Supreme Court for consideration and possible adoption as rules of court. The Judicial Study Commission had anticipated the need for these rules and has been at work on them since 1974. The first draft of the rules has now been completed, and copies were forwarded to the Supreme Court Rules Advisory Committee on October 27, 1975.

²⁹IND. CODE § 33-10.5-8-5 (Burns Supp. 1975).

³⁰*Id.* §§ 33-10.5-2-6 to -12.

³¹*Id.* § 33-10.5-2-4.

³²*Id.* § 33-10.5-2-10.

³³*Id.* § 33-10.5-2-8.

than fifteen miles per hour, or driving under the influence, will not be entitled to utilize the violations bureau procedures.³⁴

One provision of the County Court law, which is foreign to present Indiana law, allows the use of six member juries in both civil and criminal cases in the county court.³⁵ The filing of a cause on the small claims docket will act as an automatic waiver of the plaintiff's right to trial by jury. The defendant may, however, still exercise his right to jury trial by making demand for such within 10 days following the service of process. The demand must be made by affidavit and accompanied by a \$10 transfer fee. If the defendant properly demands a jury trial, the case will lose its status as a small claim and be reassigned to the plenary docket, where formal rules of procedure and evidence thereafter will apply.³⁶

Prior to the County Court Law, all actions appealed from justice of the peace courts were tried *de novo* in the local circuit or superior court.³⁷ The County Court Law drastically changes that policy by providing that all appeals from the county courts will be handled in the same manner as an appeal from a circuit court.³⁸ This provision was the subject of considerable controversy throughout the legislative process, with the primary argument in favor of trials *de novo* being the fear that the appellate courts would be overwhelmed with additional cases. The proponents of direct appeal presented several compelling reasons for its adoption. First, many circuit and superior courts are already operating at near maximum capacity, and the additional appellate burden could prove overwhelming. Secondly, trials *de novo* are often pursued solely for the purpose of delay or to force a litigant to settle a suit rather than face the expensive prospect of a retrial in a court of general jurisdiction. Finally, at least in a county court where the judge is an attorney, it can be presumed that such person's legal expertise is equivalent to that of the local circuit or superior court judge; in such event a second trial would be a meaningless waste of the party's time and the taxpayers' money.

C. Nonattorneys as Judges

The County Court Law provides that a nonattorney is eligible to serve as judge of the county court provided that such person is able to pass a qualifying examination designed and administered

³⁴*Id.*

³⁵*Id.* § 33-10.5-7-6.

³⁶*Id.* § 33-10.5-7-5.

³⁷*Id.* § 33-11-1-55 (Burns 1975). This entire article is repealed effective January 1, 1976, by Ind. Pub. L. No. 305, § 54(a) (May 5, 1975).

³⁸IND. CODE § 33-10.5-7-10 (Burns Supp. 1975).

under the direction of the Indiana Supreme Court.³⁹ On August 1, 1975, the supreme court, sua sponte, issued a brief opinion in which the justices unanimously held the testing provision unconstitutional as a violation of separation of powers.⁴⁰ The court reasoned that article 4, section 7 of the Indiana Constitution gave it specific power to ensure the competence of those persons admitted to the practice of law in Indiana and that it "cannot in good conscience concede, as this Act in question does, that less legal ability and knowledge is required of a judge than of the lawyer practicing before the judge."⁴¹ The court took notice of the fact that appeals from the county court would be taken directly to the Indiana Court of Appeals and that if a nonattorney were allowed to serve as judge, it would be reasonable to anticipate that numerous criminal convictions would be appealed on the grounds of unfair trial and denial of due process.⁴² Since the unconstitutional provision was held to be severable, the remainder of the County Court Law was allowed to stand.⁴³

D. Small Claims Dockets in Circuit and Superior Courts

The original county court bill, as drafted by the Indiana Judicial Study Commission in 1972, had provided for each county in the state at least to share a county court. However, many legislators felt that certain counties would not generate a sufficient number of cases to justify the expense of establishing such a court. It was determined that an acceptable alternative in those counties would be the creation of a small claims docket in the existing circuit court.⁴⁴ One judge would then hear the cases previously handled by the county's justice of the peace courts as well as those cases ordinarily filed in the circuit court. Allen and St. Joseph Counties had previously unified their trial court systems⁴⁵ and did not wish to fragment them again by creating an independent system of county courts. Therefore, a small claims division was created in the unified superior court of these two counties and two additional judges were authorized for each court.⁴⁶

³⁹*Id.* § 33-10.5-4-1.

⁴⁰*In re* Judicial Interpretation of 1975 Senate Enrolled Act. No. 441, 332 N.E.2d 97 (Ind. 1975). This opinion is similar in its reasoning to a recent California Supreme Court decision. *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

⁴¹332 N.E.2d at 98.

⁴²*Id.*

⁴³*Id.* at 98, 99.

⁴⁴The affected counties are listed at note 4 *supra*.

⁴⁵IND. CODE § 33-5-5.1-1 (Burns 1975) (Allen County Superior Court); *id.* § 33-5-40-1 (St. Joseph Superior Court).

⁴⁶See note 5 *supra*.

The majority of problems which have arisen in interpreting the terms of the County Court Law stem from the fact that the law is a compromise of the county court and docket-commissioner systems. When these proposals were merged into a single bill, the language used was inadequate to specify which provisions relating to the county courts were also intended to apply to the circuit and superior court dockets. On September 19, 1975, the Indiana Supreme Court issued a second advisory opinion construing these ambiguous provisions of the new law.⁴⁷ In conjunction with the portion of the law that is clear on its face, the opinion will help effectuate the orderly and uniform implementation of the County Court Law.

The County Court Law specifically provides that a small claim in a circuit court will encompass any civil action for \$3,000 or less.⁴⁸ The advisory opinion declared this same limit applicable to small claims filed in superior court dockets. However, the opinion did not resolve the inequality between plaintiffs in counties with different court systems. One should recall that to qualify as a small claim in the county court, the amount in controversy may be no more than \$1,500 and that in counties which have a county court, no other court may have a small claims docket. A resident of a county without a county court, that is, a county in which a circuit or superior court small claims docket is created, will be able to litigate a \$2,000 controversy as a small claim, while a resident of a county in which a county court is created may possess an identical claim and yet his only means of redress is to file the action on the regular docket of the county or circuit court. In order to remedy this unequal treatment of plaintiffs, there appears to be some sentiment among legislators to make the \$1,500 limit on small claims uniform throughout the state.⁴⁹

An important question answered by the advisory opinion involves the proper amount of court costs to be charged for cases filed on the small claims and misdemeanor dockets of the circuit and superior courts. The supreme court found that it was the obvious legislative intent that the costs made specifically applicable

⁴⁷*In re* Public Law No. 305 & Public Law No. 309 of the Indiana Acts of 1975, 334 N.E.2d 659 (Ind. 1975).

⁴⁸IND. CODE §§ 33-4-1-4.1 to -88.2 (Burns Supp. 1975).

⁴⁹On September 9, 1975, Chief Justice Givan called a meeting of various members of the General Assembly to discuss the content of the supreme court's forthcoming advisory opinion. Following that meeting the legislators asked the staff of the Indiana Judicial Study Commission to draft an amendment to the County Court Law to make the \$1,500 small claims jurisdiction uniform throughout the state.

to the county courts "be applied in all courts exercising small claims and misdemeanor jurisdiction under Public Law No. 305."⁵⁰

The court also addressed the question of the constitutionality of the use of six member juries. It first noted that a prior Indiana case had refused to uphold such a system,⁵¹ but the court continued on to state that the United States Supreme Court has recently held that the use of six member juries does not violate the fourteenth amendment to the United States Constitution.⁵² The court concluded that "[i]n view of the ruling of the Supreme Court of the United States and in view of the obvious legislative intent in this statute, we hold that the provision for a six member jury in the county courts is a constitutional provision."⁵³ While the section of the law concerning six member juries is specifically applicable only to the county courts,⁵⁴ the advisory opinion provides that circuit and superior courts which are exercising "county court functions" may adopt by local rule any provision which the law makes applicable to the county courts.⁵⁵ In addition to the use of six member juries, this option would include such matters as evening court sessions, change of venue from the county only upon the showing of good cause, and the establishment of a traffic violations bureau.⁵⁶

E. Financing

The County Court Law was created to fill the gap which will result when the justice of the peace system ceases to exist on January 1, 1976.⁵⁷ More importantly, it was designed to cure many of the defects which had been noted in those courts.⁵⁸ The fee system, by which the majority of justices of the peace were compensated, has been replaced by a salary of \$23,500 per year.⁵⁹ In addition,

⁵⁰334 N.E.2d at 663.

⁵¹Miller's Nat'l Ins. Co. v. American State Bank, 206 Ind. 511, 190 N.E. 433 (1934).

⁵²Williams v. Florida, 399 U.S. 78 (1970).

⁵³334 N.E.2d at 663.

⁵⁴IND. CODE § 33-10.5-7-6 (Burns Supp. 1975).

⁵⁵334 N.E.2d at 665, 667.

⁵⁶IND. CODE § 33-10.5-2-4 (Burns Supp. 1975) (traffic violations bureau); *id.* § 33-10.5-7-3 (change of venue); *id.* § 33-10.5-8-1(c) (night sessions).

⁵⁷IND. CODE § 33-11-21-2 (Burns 1975). The Indiana Constitution makes no provision for justice of the peace courts since the amendment of article 7, approved on November 3, 1970. IND. CONST. art. 7, § 20, provides, however, that justice of the peace courts are to remain in existence "unless and until such courts are abolished or altered or such laws repealed or amended by an act of the General Assembly" IND. CODE § 33-11-21-1 (Burns 1975) provides for the continued existence of the justice of the peace system until January 1, 1976. *See 1974 Survey of Indiana Law* 3 n.8.

⁵⁸*See 1974 Survey of Indiana Law* 3-7 for specific defects which have been noted in the justice of the peace system.

⁵⁹IND. CODE § 33-10.5-5-2 (Burns Supp. 1975).

all county court judges will be eligible to participate in the Judges' Retirement System.⁶⁰ Some legislators believed that this level of compensation was excessive, at least in light of the original provision that a nonattorney could serve as judge. Others believed that the county court judges should receive a salary equal to that of circuit and superior court judges.⁶¹ Those legislators holding the latter viewpoint argued that equal pay would attract more qualified applicants, keep them interested in the office for a longer period of time, and decrease the likelihood that the county court judge would be thought of as a second class judicial officer.

A further advantage of the new system will be the availability of adequate facilities and resources for the county courts. The law provides that the county shall furnish a suitable place for holding court and shall also provide adequate supplies and staff.⁶² Justice of the peace courts often received minimal funding. This fact accounts for many courts being operated in the justice's own home.⁶³ There have been recent newspaper reports that at least one county is refusing to fund its new court;⁶⁴ however, the provisions of the bill providing for operating appropriations from the county council are clearly mandatory,⁶⁵ and in all probability this matter will soon be resolved.

It was often argued that since justice of the peace courts were self-supporting, any formalization of the system would result in an additional burden on local taxpayers. Research by the staff of the Indiana Judicial Study Commission resulted in a finding that during 1974 only one-sixth of the 352 justice of the peace courts for which figures were available actually produced revenues in excess of expenditures.⁶⁶ It would be impossible accurately to predict revenues from the county court system, but it is worthy of note that there is currently in operation a full-time county court in Hendricks County and a part-time court in Hancock County

⁶⁰*Id.* § 33-10.5-8-3. *Id.* § 33-13-8-1 (Burns 1975) provides for the formation and operation of the Judges' Retirement System.

⁶¹There are three salaries for circuit and superior court judges and the total amount of a particular judge's salary is dependent upon the population and assessed valuation of the judge's home county. *Id.* §§ 33-13-12-6, -8 (Burns 1975). The three salaries are \$31,500, \$28,500 and \$26,500. *Id.* § 33-13-12-8 (Burns Supp. 1975).

⁶²*Id.* §§ 33-10.5-8-1, -3.

⁶³STAFF OF INDIANA JUDICIAL STUDY COMM'N, REPORT NO. 2—JUSTICE OF THE PEACE SYSTEM 6 (1974).

⁶⁴Lafayette Journal and Courier, Sept. 11, 1975, § B at 1.

⁶⁵IND. CODE §§ 33-10.5-8-1 to -3 (Burns Supp. 1975).

⁶⁶Unpublished research by the staff of the Indiana Judicial Study Commission shows that in 1974 the revenues of only fifty-six justice of the peace courts exceeded the amount of funds appropriated for their operation. Two hundred forty courts operated at a loss and thirty-six courts broke even.

and that both of these courts operate at a profit to their communities.⁶⁷ It should suffice to say that a court is capable of generating a certain amount of funds to offset its operating costs and that any further revenue generating requirement indicates a mistaken concept of the proper role of the judiciary.

F. Caseloads

Subsequent to the passage of the County Court Law, the major concern of the circuit court judges was that their courts would be inundated by the cases currently handled by the local justices of the peace and that serious caseload backlogs would therefore result.⁶⁸ The 99th General Assembly foresaw this eventuality. The House and Senate both passed Senate Bill 171, which would have allowed these judges to appoint a master commissioner to serve as a hearing officer in the circuit court.⁶⁹ Unfortunately, the bill was vetoed by Governor Bowen after the 1975 session had ended. Circuit court judges thus were left without any statutory authority to appoint an assistant. The supreme court remedied this situation in ruling that it would adopt an amendment to Indiana Trial Rule 53 which would authorize the appointment of a referee to assist the judge in performing "county court functions."⁷⁰ The court further held that since the State was paying a portion of the county court judge's salary, it should also pay the same percentage of the referee's compensation. The total amount to be paid to the referee will be determined by the appointing judge.⁷¹

The county court system will be capable of processing a high volume of cases in a relatively short amount of time. During the first five months of this year, the Hendricks County Court handled approximately 2,500 traffic and misdemeanor cases and 200

⁶⁷This conclusion is based on interviews conducted by the staff of the Indiana Judicial Study Commission with Judge Mowrer of the Hendricks County Court and Judge Gottschalk of the Hancock County Court.

⁶⁸The circuit judges who were to administer the new dockets were so concerned about the number of cases that they invited Chief Justice Givan to discuss the problem with them. The meeting was held on June 6, 1975, at which time the judges requested that the supreme court take some action which would allow them to appoint a hearing officer to assist in handling small claims, misdemeanors, and traffic cases.

⁶⁹1975 IND. S. JOUR. 879; 1975 IND. H.R. JOUR. 836.

⁷⁰334 N.E.2d at 666.

⁷¹*Id.* The Indiana Code of Judicial Conduct provides that a referee is to be considered as a judge for the purpose of compliance with the Code and that part-time judges may not practice law in the court on which they serve. This provision may seriously limit the number of attorneys who are willing to serve as a referee, and because of it a circuit judge may find it necessary to look outside the county for qualified applicants.

civil claims.⁷² In addition, that court also issued search and arrest warrants and set bond in felony cases pending transfer to the local circuit or superior court.⁷³ It can be anticipated that the number of small claims cases will increase as individuals realize the potential of the new court.⁷⁴ The fact that the county courts have civil jurisdiction of up to \$3,000 may also relieve the pressure on many overburdened circuit and superior courts. At least in many of the small counties, the number of contract and tort cases in which the amount claimed is under \$3,000 may approach 50 percent of the total filings.⁷⁵ Prior to the enactment of the County Court Law, the justice of the peace system was the only available forum for the adjudication of small claims, and the majority of these courts did not exercise civil jurisdiction.⁷⁶ Therefore, a litigant often was forced either to forego his claim or to choose the uneconomical and time-consuming option of filing in the circuit or superior court. The county court's capability for providing a convenient and inexpensive small claims forum thus will accomplish a great service for the citizens of Indiana.

G. Public Reception

The revised minor courts system has met with both praise and criticism since its adoption. The president of the Indiana State Bar Association, Gerald H. Ewbank, termed the legislation a "landmark for justice" and further stated that the county courts will be "people's courts" and "they can mean a higher quality of justice in matters which touch most of the public—the smaller civil actions, misdemeanors and traffic offenses."⁷⁷ Many county officials have voiced concern that the entire cost of the courts, with the exception of \$18,000 of the judge's salary,⁷⁸ was placed di-

⁷²This statement is based on an interview conducted by the staff of the Indiana Judicial Study Commission with Judge Mowrer of the Hendricks County Court.

⁷³IND. CODE §§ 33-5.5-2-4, -5(d) (Burns 1975).

⁷⁴In an interview with the staff of the Indiana Judicial Study Commission, Judge Andrews of the Bloomington City Court stated that since the creation of a small claims docket in that court in 1972, the number of filings had increased from 206 the first year to approximately 800 in 1974.

⁷⁵STAFF OF INDIANA JUDICIAL STUDY COMM'N, STUDY OF THE PROPOSED WARRICK COUNTY SUPERIOR COURT 1-2 (1975).

⁷⁶STAFF OF INDIANA JUDICIAL STUDY COMM'N, REPORT NO. 2—JUSTICE OF THE PEACE SYSTEM 6 (1974); STAFF OF INDIANA JUDICIAL STUDY COMM'N, EXPLANATION AND FULL TEXT OF THE COUNTY COURT BILL 8 (1973).

⁷⁷Press Release of the Indiana State Bar Association, May 12, 1975.

⁷⁸IND. CODE § 33-10.5-5-2 (Burns Supp. 1975). The State also pays only a portion of other trial court judges' salaries. The amount of state payment is \$22,000 per year regardless of the judge's annual salary. See note 61 *supra*.

rectly on the shoulders, or more appropriately the pocketbooks, of the counties.⁷⁹ The situation would appear to be most critical in the smaller counties. Many of the costs of operating a court are fixed expenses, and therefore the less populous counties will experience a relatively higher per capita burden. The inequality of the system is even more evident when one considers the fact that, even though located in the counties, these are in fact state courts with statewide jurisdiction.⁸⁰ Further, a recent study has shown that the amount of money expended by the state on judicial functions is equal to only three-tenths of 1 percent of the total state budget and that when court-generated revenues are subtracted from this amount, the figure is decreased to one-tenth of 1 percent.⁸¹

Regardless of the problems which the new system will face in implementation and operation, it is obviously a move in the right direction. Everyone involved in the area of court operation and legislation must remain mindful of the fact that upgrading the judiciary is a dynamic process and that changes for the betterment of the system must continue to keep pace with the needs of society. In this respect the County Court Law should be considered as the first step, rather than the final solution, in minor court reform. With this fact in mind, the legislation will be capable of accomplishing its major goal of creating a system for the efficient, expeditious, and inexpensive handling of small claims, traffic, and misdemeanor cases.

The individual counties must then pay the remainder of the salary. IND. CODE § 33-13-12-7 (Burns Supp. 1975).

⁷⁹The author recently had the privilege of speaking to the annual meeting of the clerks of Indiana circuit courts, which was conducted in Nashville, Indiana, on September 10, 1975. The majority of the complaints voiced by the clerks concerned the problems of financing the new court system at the local level.

⁸⁰IND. CONST. art. 7, § 1 provides that "[t]he judicial system of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."

⁸¹These figures were compiled by the staff of the Indiana Judicial Study Commission as a portion of the financial statistics which will appear in the report of a study currently being conducted for the commission by the American Judicature Society. In addition to fiscal information, the report will include sections concerning the physical and administrative structure of the Indiana trial court system. The study is expected to be published before the end of 1975.

II. Administrative Law

William E. Marsh*

A. Scope of Judicial Review

The case most interesting to an observer of the administrative process and perhaps the most significant case of this review period is *City of Gary v. Gause*.¹ The Gary Police Department brought charges against Gause, a policeman, for various violations of Police Civil Service Commission Rules. The violations were related to Gause's alleged extortion of money from a citizen. The charges were heard by the Gary Police Civil Service Commission, which found Gause guilty as charged and ordered him dismissed from the police force. Gause then filed a complaint in Lake Superior Court appealing the decision.² The superior court found for Gause, ordering that he be reinstated and that all back wages be paid to him. The city appealed.³ The Third District Court of Appeals, in reversing the Lake Superior Court, held that for trial courts substantial evidence constitutes the appropriate scope of judicial review of administrative agency decisions, despite the fact that the statute authorizing judicial review unambiguously states that the review shall be heard by the trial court *de novo*.⁴ The court

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The author wishes to extend his appreciation to John T. LaMacchia for his assistance in the preparation of this discussion.

¹317 N.E.2d 887 (Ind. Ct. App. 1974). See *State Bd. of Tax Comm'rs v. Stove City Plaza*, 317 N.E.2d 182 (Ind. Ct. App. 1974), in which the First District Court of Appeals recites in dicta the principles discussed in *Gause*. *Id.* at 183-84.

²IND. CODE § 18-1-11-3 (Burns 1974) provides, *inter alia*, that "[a]ll such appeals shall be tried by the court unless written request for jury be made not less than five [5] days before the date set for said hearing, and shall be heard *de novo* upon the issues raised by the charges"

³IND. CODE § 18-1-11-3 (Burns 1974) provides that "[t]he final judgment of the [superior or circuit] court shall be binding upon all parties and no further appeal therefrom shall be allowed." This legislative preclusion of appeal has been held to be unconstitutional. *Hanson v. Town of Highland*, 237 Ind. 516, 147 N.E.2d 221 (1958); *City of Elkhart v. Minser*, 211 Ind. 20, 5 N.E.2d 501 (1937).

⁴As to the scope of judicial review by the trial court, the court of appeals stated the following:

[IND. CODE § 18-1-11-3 (Burns 1974)] provides that an appeal from an order dismissing a policeman shall be heard by the trial court *de novo*. However, it has been held that this is not literally true.

of appeals did not cite any persuasive authority supporting this disregard of the legislative command, and the opinion does not clearly reveal the court's reasons for refusing to apply the statute. As authority for its holding, the court cited *City of Mishawaka v. Stewart*⁵ and *Kinzel v. Rettinger*.⁶ However, neither case supports the decision of the court of appeals in *Gause*.

The supreme court in *Stewart* specifically said that it was deciding only two issues, neither of which dealt with the scope of judicial review in the trial court.⁷ The court affirmed the trial court's order that the plaintiff be reinstated because the agency proceedings did not provide him due process. The scope of review in the trial court was not even remotely an issue in the case. *Kinzel* did not involve a statute mandating a de novo review in the trial court. It is not unusual for courts, as the court of appeals did in *Kinzel*, to establish substantial evidence as the appropriate scope of judicial review where there exists no legislation bearing on the issue. It is a far different matter to hold, as in *Gause*, that substantial evidence constitutes the appropriate scope of judicial review where a statute provides that review should be de novo.

Our Supreme Court in *City of Mishawaka v. Stewart* (1974), 310 N.E.2d 65, at 68-69, stated that: "This has been held to mean, not that the issues at the hearing before the board are heard and determined anew, but rather that new issues are formed and determined.

"'. . . a review or appeal to the courts from an administrative order or decision is limited to a consideration of whether or not the order was made in conformity with proper legal procedure, is based upon substantial evidence, and does not violate any constitutional, statutory, or legal principle. . . .' State ex rel. Public Service Commission v. Boone Circuit Court, etc. (1956), 236 Ind. 202, 211, 138 N.E.2d 4, 8.

"Insofar as the findings of fact by an administrative board are concerned, the reviewing court is bound by them, if they are supported by the evidence. It may not substitute its judgment for that of the board. *Kinzel v. Rettinger* (1972), Ind. App., 277 N.E.2d 913."

317 N.E.2d at 890.

⁵310 N.E.2d 65 (Ind. 1974), noted in Taylor, *Administrative Law*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 12, 17-19 (1974).

⁶151 Ind. App. 119, 277 N.E.2d 913 (1972).

⁷The court stated as follows the issues it felt to be pertinent:

I. Must a litigant . . . file a petition for rehearing within ten days of the decision of the trial court as a prerequisite to perfecting an appeal to the Court of Appeals?

II. Were the "due process" rights of the petitioner, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 12 of the Constitution of Indiana, violated by virtue of the City Attorney, in his capacity as a member of the Board of Public Works and Safety, participating as a voting member thereof in determining the disciplinary issue before it, while

One Indiana Supreme Court case, *Uhlir v. Ritz*,⁹ supports the conclusion reached by the court of appeals in *Gause*, but the rationale of the *Uhlir* opinion is no stronger than that of *Gause*. The Indiana Insurance Commissioner revoked a bail bondsman license. An Indiana statute provided that the commissioner's order could be appealed to the circuit court and that "such appeal shall be heard de novo."¹⁰ The supreme court held that in conducting a review under the statute, a circuit court "may negate that finding only if, based upon the evidence as a whole, the finding of fact was (1) arbitrary, (2) capricious, (3) an abuse of discretion, (4) unsupported by substantial evidence or (5) in excess of statutory authority."¹¹ This statement of the test of the scope of judicial review comes from the Administrative Adjudication Act¹¹ despite the court's explicit recognition that the

also presenting the case against the petitioner?
310 N.E.2d at 66.

⁹255 Ind. 342, 264 N.E.2d 312 (1970).

⁹IND. CODE § 35-4-5-24 (Burns 1975).

¹⁰255 Ind. at 345, 264 N.E.2d at 314.

¹¹The Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 *et seq.* (Burns 1974). Section 4-22-1-18 of the Act provides:

On such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this act [4-22-1-1 — 4-22-1-30].

On such judicial review, if the agency has complied with the procedural requirements of this act, and its finding, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed.

If such court finds such finding, decision or determination of such agency is:

- (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
- (2) Contrary to constitutional right, power, privilege or immunity; or
- (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
- (4) Without observance of procedure required by law; or
- (5) Unsupported by substantial evidence, the court may order the decision or determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

Said court in affirming or setting aside the decision or determination of the agency shall enter its written findings of facts, which may be informal but which shall encompass the relevant facts shown by the record, and enter of record its written decision and order or judgment.

statute did not apply to the case.¹² As to why *de novo* does not really mean *de novo*, the court suggested that constitutional principles of separation of powers were involved.¹³

*Public Service Commission v. City of Indianapolis*¹⁴ most clearly explains the court's rationale in *Uhlir*. A statute provided for a *de novo* appeal to the circuit court of rate-making decisions of the Public Service Commission.¹⁵ The court held that a *de novo* review was constitutionally impermissible. Review should only determine whether the decision was supported by substantial evidence. The court reasoned that the statutory command should be disregarded because the principles of separation of powers do not allow the legislature constitutionally to delegate *legislative* power to the judicial branch.¹⁶ The legislative

¹²255 Ind. at 344, 264 N.E.2d at 313-14.

While it does not apply in bail license cases, the Administrative Adjudication and Court Review Act, passed in part to provide a method of court review of certain *other* administrative actions, shows the legislature's awareness of our proper field of activity.

Id. (emphasis supplied by the court and citations omitted).

¹³The *Uhlir* court analyzed the constitutionality of *de novo* review as follows:

In the case at hand a special statute on court review, [IND. CODE § 35-4-5-24 (Burns 1975)], was enacted. It states that a review "*de novo*" of a license revocation may be secured. It is the term "*de novo*" which must concern us. While in the usual sense of that phrase one might envisage a complete retrial of the issues involved, our constitutional relationship with the other branches of government precludes such a review. Our legislature is aware of our duty and its scope and we will not attach to its language the innuendo that it wishes our courts to exceed the bounds of proper re-examination. Even if such was clearly mandated, we could proceed only so far in such reviews as the dictates of constitutional law permit.

255 Ind. at 345, 264 N.E.2d at 314.

¹⁴235 Ind. 70, 131 N.E.2d 308 (1956), cited in *Uhlir v. Ritz*, 255 Ind. at 345, 264 N.E.2d at 314. In addition to *City of Indianapolis*, the *Uhlir* court cited two other cases in support of its decision. *City of Evansville v. Nelson*, 245 Ind. 430, 199 N.E.2d 703 (1964) (citing *City of Indianapolis*, and reciting the rule that *de novo* review of an administrative decision is constitutionally impermissible but not offering any further rationale); *Department of Financial Inst. v. State Bank*, 253 Ind. 172, 252 N.E.2d 248 (1969) (involving a review under the Indiana Administrative Adjudication Act which specifically provides that trial courts should not hear the review *de novo*). See note 11 *supra*.

¹⁵IND. CODE § 8-1-2-6(b) (Burns 1973).

Any single municipality or any ten [10] consumers or any utility affected by a rate order may within thirty [30] days from the rendition thereof by the Commission take an appeal *de novo* to the circuit court

¹⁶Legislative power can be delegated to an administrative agency or the executive branch provided that the delegation is accompanied by ade-

power in question was the power to set utility rates. A *de novo* review implies judicial fact finding and a subsequent decree setting utility rates. These activities clearly are in the nature of rate making. When the legislature properly delegated these powers, it reserved them to the administrative agency. Therefore, the substantial evidence test properly limits the scope of review in such cases.¹⁷

Given the valid principle in *City of Indianapolis* that *legislative* functions may not be delegated to the judicial branch, it does not follow that *judicial* functions cannot be delegated to the judicial branch. Since separation of powers constitutes the source of the doctrine, the distinction between legislative and judicial functions is critical. The Indiana Constitution unequivocally provides that the legislature controls the jurisdiction of the courts. Several provisions in article 7 deal with this subject. Most directly on point with respect to *Gause* is section 8, which provides that "[t]he Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law."¹⁸ In construing article 7, section 8 of the Indiana Constitution, the supreme court has always declared the obvious: the General Assembly has the power to regulate the jurisdiction of the circuit courts.¹⁹ Since the

quate standards. See *Orbison v. Welsh*, 242 Ind. 385, 179 N.E.2d 727 (1962); *Ennis v. State Highway Comm'n*, 231 Ind. 311, 108 N.E.2d 687 (1952); *Benton County Council v. State ex rel. Sparks*, 224 Ind. 114, 65 N.E.2d 116 (1946); *Kryder v. State*, 214 Ind. 419, 15 N.E.2d 386 (1938); *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900).

¹⁷The *City of Indianapolis* court analyzed the issue of separation of powers as follows:

The "substantial evidence" rule, in statutory appeals of this kind, leaves the function of fact-finding and rate-making with the Commission, where it belongs, and does not attempt to make it a responsibility or duty of the court, where it does not belong.

In the first place, rate-making is a legislative, not a judicial function, and even if a statute attempted to lodge such power in a court it would be unconstitutional. Although we have a constitutional system of government in which the judiciary is said to be supreme in determining the jurisdiction and limits on the powers of the other branches of the government, as fixed by the constitution and laws, yet this supremacy does not extend to the point where we may substitute our judgment for, or control the discretionary action of the executive or legislative branches, so long as their action is within the sphere and jurisdiction fixed by the statutes and constitution.

235 Ind. at 81, 131 N.E.2d at 312.

¹⁸Prior to an amendment which was effective on November 3, 1970, this section read: "The Circuit Courts shall each consist of one judge, and shall have such civil and criminal jurisdiction as may be prescribed by law."

¹⁹See *State ex rel. Palmer v. Circuit Court*, 244 Ind. 297, 192 N.E.2d 625 (1963); *State ex rel. Bradshaw v. Probate Court*, 225 Ind. 268, 73 N.E.2d

judicial function could be performed by the circuit court in the first instance where an administrative agency is not involved, surely separation of powers does not prohibit a legislative scheme, established under section 8, which contemplates a de novo judicial determination after an administrative proceeding.²⁰

The court in *Gause* properly disallowed a de novo review only if the General Assembly required a de novo review in the circuit court of a legislative function. It seems clear that the activity being reviewed in *Gause* was actually a judicial function. In *In re Northwestern Indiana Telephone Co.*,²¹ the Indiana Supreme Court had previously recognized the distinction between authorizing a judicial review de novo of a judicial function and a judicial review de novo of a legislative function, holding that the latter was unconstitutional. The court quoted from an opinion of the United States Supreme Court as properly stating the distinction between judicial and legislative functions: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."²² Under this definition, the Gary Police Civil Service Commission undertook a judicial function regarding Glenn Gause. At issue were Gause's commission of specific violations of the rules of the Gary Police Department as they then existed and, if guilt was found, the penalty to be invoked. The circuit court could have made these kinds of decisions in the first instance.

The Indiana Supreme Court should recognize the distinction between review of legislative and review of judicial functions. When the subject of judicial review of an administrative decision

769 (1947); *State ex rel. Gannon v. Lake Circuit Court*, 223 Ind. 375, 61 N.E.2d 168 (1945); *Board of Comm'rs v. Albright*, 168 Ind. 564, 81 N.E. 578 (1907). *But cf.* *State ex rel. County Welfare Bd. v. Starke Circuit Court*, 238 Ind. 35, 39, 147 N.E.2d 585, 587 (1957) (the legislature may confer upon judges powers that are not strictly of a judicial character).

²⁰Some of the opinions discussed herein give policy reasons for not providing de novo review of administrative decisions. There are in fact valid policy reasons, such as administrative and judicial efficiency, which make de novo review usually inappropriate. Such policy decisions, however, are properly left to the General Assembly. They cannot support a court's refusal to exercise the de novo jurisdiction required by the General Assembly. The constitutional provision of article 7, section 8, that the General Assembly can regulate the jurisdiction of the circuit court, overrides the court's views regarding the policy considerations of the appropriate scope of judicial review.

²¹201 Ind. 667, 171 N.E. 65 (1930).

²²*Id.* at 684, 171 N.E. at 71, quoting from *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

involves a legislative function, separation of powers may properly preclude a *de novo* review. However, where the subject of the review involves a judicial function, clearly the scope of judicial review lies within the absolute control of the Indiana General Assembly under article 7, section 8 of the Indiana Constitution. The General Assembly's decision should be respected.²³

B. Standing to Secure Review

The Second District Court of Appeals considered the requirements for standing to challenge Indiana administrative rulings in *Stout v. Mercer*.²⁴ *Stout* involved an appeal from a decision of the Clay County Board of Zoning Appeals.²⁵ The Stouts obtained a variance from the board to place a mobile home on land in a residential zone. The Mercers, owners of property adjoining that on which the mobile home was to be placed, filed a petition with the circuit court for a writ of certiorari; upon trial, the circuit court reversed the decision of the board. On appeal the Stouts argued that the Mercers lacked standing to challenge the board's action because of their failure to appear and object at the variance hearing.²⁶ The court rejected this contention, holding that, notwithstanding their failure to appear previously, the Mercers were persons aggrieved by the action of the board within the meaning of the statute.²⁷ The court reasoned that, as owners of adjoining property, the Mercers had a property interest which was legally affected by the grant of the variance, and thus they had standing to secure judicial review of the board's action.

In deciding that the Mercers had standing, the court ostensibly adhered to the doctrine of *McFarland v. Pierce*,²⁸ an 1897 case.

²³The 1975 Indiana General Assembly passed substantial amendments to the statutes which govern police and fire personnel in consolidated cities. The new amendments remove the "de novo" language from sections of the statutes which provide for appeal to the circuit or superior courts of a merit board decision. IND. CODE §§ 18-4-12-27, -28, -48 (Burns Supp. 1975), *amending id.* §§ 18-4-12-27, -28, -48 (Burns 1974).

²⁴312 N.E.2d 515 (Ind. Ct. App. 1975).

²⁵IND. CODE § 18-7-5-87 (Burns 1974) provides in part:

Every decision of the board of zoning appeals shall be subject to review by certiorari.

Any person or persons, firm or corporation jointly or severally aggrieved by any decision of the board of zoning appeals, may present to the circuit or superior court of the county in which the premises affected is [sic] located a petition duly verified, setting forth that such decision is illegal in whole or in part, and specifying the grounds of the illegality.

²⁶312 N.E.2d at 517.

²⁷*Id.* at 520.

²⁸151 Ind. 546, 45 N.E. 706 (1897).

Under the *McFarland* test, in order to have standing to appeal an administrative procedure, an appellant must have a legal interest which would be enlarged or diminished by the outcome of the appeal.²⁹ However, since the *Stout* court did not elaborate upon its conclusion that the legal interest of adjoining or surrounding property owners may be affected by a variance, it is difficult to discern the character of the interest on which the court based its decision. Although a variance has no legal effect upon the manner or scope of exercise of the property interest of a neighbor, a variance can substantially affect the economic and aesthetic value in surrounding properties. It is arguable that the *Stout* court considered the possibility that economic injury to a property interest was the measure of standing, rather than the more demanding *McFarland* test that a legal interest must be enlarged or diminished.³⁰

The court of appeals in *Stout* found it necessary to distinguish the instant appeal from *Fidelity Trust Co. v. Downing*.³¹ In so doing, the court recognized an interest of neighboring property owners denied by the Indiana Supreme Court in *Fidelity*. In *Fidelity*, also a zoning appeal case, the court construed the "persons aggrieved" language in a similar zoning statute.³² The defendant asked the Indiana Supreme Court to reverse a judgment obtained by the plaintiff below which enjoined reconstruction of a dilapidated restaurant stand. The stand, which the defendant sought to reconstruct following its collapse, was a nonconforming use established prior to enactment of the zoning ordinance.³³

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The word "aggrieved" in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. To be "aggrieved" is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury. The appellant must have a legal interest which would be enlarged or diminished by the result of the appeal.

Id. at 548, 45 N.E. at 707, quoted in *Stout v. Mercer*, 312 N.E.2d 515, 518 (Ind. Ct. App. 1974) (citations omitted).

³⁰"The use to which a tract of land is put may have a direct effect upon the value of surrounding properties." 312 N.E.2d at 520.

³¹224 Ind. 457, 68 N.E.2d 789 (1946).

³²Ch. 225, § 5, [1921] Ind. Acts 660 (repealed 1947). The language of the 1921 statute under consideration in *Fidelity* is almost identical to that in IND. CODE § 18-7-5-87 (Burns 1974), quoted at note 25 *supra*.

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[The ordinance] provides among other things that a nonconforming use existing at the time of its passage may be continued, but that a building arranged or designed or devoted to a nonconforming use at the time of the passage of the ordinance may not be *reconstructed*

At issue was whether or not the plaintiff had exhausted his administrative remedy prior to seeking injunctive relief.³⁴ The court reasoned that since the administrative remedy was available only to persons aggrieved by the action of the building official, that remedy was not available to the plaintiff, who was merely a property owner within the same zoning district.³⁵ In holding that a property owner within the same zoning district is not necessarily a person aggrieved, the court expressly limited the breadth of the statutory term to persons directly affected by the action of the administrative official or board charged with enforcing the ordinance.³⁶

The *Stout* court distinguished *Fidelity* as involving the mere ministerial act of issuing a building permit, whereas the challenged action in *Stout* was the granting of a variance. The granting of a variance was considered to be a legislative act which affected legal property interests differently and directly.³⁷ Such a distinction, however, appears more illusory than real from the vantage point of a property owner in the vicinity of the affected property. Regardless of how the administrative action is classified, the residential property owner in the one case finds a revived business operating in his residential zone and in the other a mobile home installed on an adjacent lot. If there is a diminution of a legal interest of the property owner in the one case, there is a diminution in the other.³⁸

or *structurally altered* to an extent exceeding in aggregate cost during any 10-year period 60 per cent of the assessed value of the building

224 Ind. at 459-60, 68 N.E.2d at 790 (emphasis supplied by the court).

³⁴*Id.* at 462. See note 42 *infra*.

³⁵The term "zoning district" refers to the character of use, not to a geographical region. "The word 'district,' as used in this act, does not necessarily mean contiguous territory, but several parts of the city may be classified as one district, although not contiguous." Ch. 225, § 1, [1921] Ind. Acts 660 (repealed 1947). The opinion does not reveal where appellees resided in the district relative to the premises in question.

³⁶The pertinent language of the *Fidelity* court is as follows:

The appellees were not parties to the building permit. . . . It would seem to us that the term *person aggrieved* is not broad enough to include anyone other than the person directly affected by the action of the administrative official or the board charged with the enforcement of the ordinance. To hold otherwise would be to hold that every property owner in any particular district would be compelled to take notice of every action of such officer or board.

224 Ind. at 463, 68 N.E.2d at 791 (emphasis in original).

³⁷312 N.E.2d at 519.

³⁸*Fidelity* has been relied upon to deny standing to city officials. See *City of Hammond v. Board of Zoning Appeals*, 152 Ind. App. 480, 284 N.E.2d

It appears that the Second District Court of Appeals has expanded the standing doctrine in Indiana to encompass nonlegal interests.³⁹ Just as the United States Supreme Court rejected the "private legal interest" test for standing propounded in *Perkins v. Lukens Steel Co.*⁴⁰ in favor of more liberal requirements, the Indiana Court of Appeals may be embarking upon a similar course in state doctrine. The federal doctrine has developed considerably since *Perkins* was rejected, standing in recent years having been granted to parties sustaining injury to economic interests as well as to "'aesthetic, conservational, and recreational' . . . values."⁴¹ These economic and noneconomic interests are distinct from whatever legal interest of the parties is affected by the challenged administrative action. It is clear that the Mercers suffered economic and aesthetic injury as a result of the variance and, therefore, under the expanded federal notion of standing, would have had standing to challenge the action of the Board of Zoning Appeals.

119 (1972); *Metropolitan Dev. Comm'n v. Cullison*, 151 Ind. App. 48, 277 N.E.2d 905 (1972).

³⁹*Cf.* *City of Hammond v. Board of Zoning Appeals*, 152 Ind. App. 480, 284 N.E.2d 119 (1972). The Third District Court of Appeals denied standing to the city of Hammond to challenge a zoning ordinance because it failed "to demonstrate a personal or pecuniary interest which would qualify it as an 'aggrieved' party within the meaning of the statute." *Id.* at 489, 248 N.E.2d at 126. The statute involved, Indiana Code section 18-7-5-87, is quoted at note 25 *supra*.

⁴⁰310 U.S. 113 (1940). In *Perkins* the United States Supreme Court stated:

Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of law.

Id. at 125.

⁴¹*Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970), *quoting from* *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Barlow v. Collins*, 397 U.S. 159, 164 (1970). The *Data Processing/Barlow* requirement for standing to obtain judicial review has two elements: (1) The appellant must suffer injury in fact, either economic or otherwise, and (2) the appellant must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. *Accord*, *Stanton v. Ash*, 384 F. Supp. 625 (S.D. Ind. 1974). The *Stanton* court held that the plaintiff, an Indiana motorist, did not have standing as a citizen, taxpayer, or person aggrieved under the Federal Administrative Procedure Act, 5 U.S.C. § 702 (1970), to challenge the impoundment of federal highway funds. Plaintiff's interest was no different from the generalized stake of all citizens in the improvement of highways and his alleged injury was not sufficiently concrete.

C. Exhaustion of Administrative Remedies

The Indiana Court of Appeals decided two cases involving the exhaustion of administrative remedies.⁴² In *Brutus v. Wright*⁴³ a taxpayer brought a public action in circuit court to enjoin new construction at a public high school. The plaintiff challenged the actions of the defendant school board regarding the wisdom of appropriating funds for the new construction, the propriety of the bidding procedures utilized, and the legality of proposing to issue bonds to finance the project. Indiana Code section 34-4-17-8, a part of the chapter authorizing the public actions involved in *Brutus*, requires (1) that a plaintiff exhaust all administrative remedies before commencing a law suit and (2) that the plaintiff not raise any issue which he could have but did not raise at a public hearing.⁴⁴ The circuit court granted the defendant's motion for summary judgment on the grounds that the plaintiff had not exhausted his administrative remedies as required by the statute. The Third District Court of Appeals affirmed the summary judgment as to the plaintiff's challenges to the appropriation of funds for construction and the issuance of bonds but reversed the summary judgment on the claim of improper bidding procedures.

As required by statute, the school board held a public hearing on the appropriation to allow taxpayers an opportunity to be heard. A nay vote by one of the board members was the only objection shown by the minutes. The plaintiff asserted that this nay vote constituted an objection by a taxpayer which would satisfy the exhaustion of administrative remedies requirement. The court stated that a simple general objection without statement of reasons is insufficient to preserve an issue for a public law suit and that a vote by a board member cannot be deemed a remonstrance by a taxpayer. The plaintiff was required to challenge the appropria-

⁴²The principle that statutory administrative remedies must be exhausted before judicial review can be obtained has been frequently recognized in Indiana. *Hooser v. Baltimore & O.R.R.*, 279 F.2d 197 (7th Cir. 1960) (grievance procedures of a collective bargaining agreement must be exhausted before judicial relief may be sought); *City of East Chicago v. Sinclair Refining Co.*, 232 Ind. 295, 111 N.E.2d 459 (1953) (petitioner seeking a variance from a zoning ordinance must seek relief from the Board of Zoning Appeals); *Evansville City Coach Lines v. Rawlings*, 229 Ind. 552, 99 N.E.2d 597 (1951) (tariff complaints should be directed to the Indiana Public Service Commission which then is proper party to seek compliance). See Fuchs, *Judicial Control of Administrative Agencies in Indiana: II*, 28 IND. L.J. 293, 297 (1953).

⁴³324 N.E.2d 165 (Ind. Ct. App. 1975).

⁴⁴IND. CODE § 34-4-17-8 (Burns 1973).

tion at the public hearing; his failure to do so barred his suit attacking the appropriation.⁴⁵

The Indiana Code provides upon the petition of ten or more taxpayers for an appeal to the State Board of Tax Commissioners challenging the issuance of bonds.⁴⁶ The *Brutus* court held that the plaintiff could not maintain his suit because the record did not show that he had attempted to exhaust this administrative remedy.⁴⁷ The court thus plainly requires some effort to obtain review by the State Board of Tax Commissioners of the issuance of bonds before judicial review will be allowed. However, the opinion leaves unanswered exactly what efforts are necessary. Since the appeal can be taken only by ten or more taxpayers, the remedy cannot be exhausted by an individual taxpayer. It is not a common requirement that a plaintiff exhaust administrative remedies which he cannot exhaust alone.⁴⁸ The opinion does not indicate whether failure to exhaust the statutory remedy by a single taxpayer, who sought but was unable to obtain nine other taxpayers to join the petition, would be a bar to judicial review. The appellate court reversed the summary judgment against the plaintiff's challenge to the bidding procedures.⁴⁹ Since the court did not discuss the exhaustion of administrative remedies with respect to this claim, it appears that the bidding procedures need not be challenged at the required public hearing or in any other administrative proceeding.

The second decision dealing with exhaustion of administrative remedies has a more general application. In *State v. Frye*⁵⁰ the First District Court of Appeals required that the plaintiff exhaust administrative remedies before seeking a court order that an agency comply with a request for discovery. Frye, a former chaplain at the Rockville Training Center, a Department of Corrections institution, was processing his grievance appeal before the State Employees' Appeals Commission.⁵¹ In preparing the appeal, Frye's

⁴⁵324 N.E.2d at 168-69.

⁴⁶IND. CODE § 6-1-1-25 (Burns 1972).

⁴⁷324 N.E.2d at 169.

⁴⁸An administrative remedy which requires for exhaustion the cooperative efforts of numerous individuals might be held to be inadequate and, therefore, not mandatory. See *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), in which the United States Supreme Court held inadequate an Illinois administrative remedy requiring that the lesser of 50 residents of a school district, or 10 percent, file a complaint alleging school segregation. See also K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.97, at 392 (3d ed. 1972).

⁴⁹324 N.E.2d at 171.

⁵⁰315 N.E.2d 399 (Ind. Ct. App. 1974).

⁵¹The powers and duties of the State Employees Appeals Commission are codified at IND. CODE §§ 4-15-1.5-1 to -8 (Burns 1974). The commission

attorney submitted interrogatories to the Rockville Training Center pursuant to Indiana Rule of Trial Procedure 28(F),⁵² which applies the civil discovery rules to administrative proceedings. When the training center refused to answer the interrogatories, the plaintiff obtained an order from the circuit court that the interrogatories be answered. The Center appealed.

The court of appeals reversed, holding that the circuit court had the power to issue the enforcement order to the Center but that the order was premature where the petitioner had not previously sought an order compelling discovery from the State Employees' Appeals Commission. The opinion suggests that the petitioner must seek answers to his interrogatories from the Department of Corrections before obtaining court-ordered discovery.⁵³ If this is the case, Frye may have failed to exhaust a second administrative remedy.

D. Administrative Procedures

In *Indiana Department of Public Welfare v. DeVoux*,⁵⁴ the Second District Court of Appeals held that the Indiana Department of Public Welfare, in ruling on the eligibility of an applicant for Aid to the Permanently and Totally Disabled (APTD),⁵⁵ must base its decision on the record adduced at the hearing⁵⁶ and must give the applicant an opportunity to confront all the evidence considered. The court found the absence of these requirements in the department's regulations to be a notable, but not significant, omission. The omission was not significant because these elements of a fair hearing were found to be required by the regulations of the

is empowered to hear appeals from decisions by the state personnel director regarding employee complaints. The complaint procedure is set forth at IND. CODE § 4-15-2-35 (Burns 1974).

⁵²IND. R. TR. P. 28(F) provides in part:

Whenever a hearing before an administrative agency is required, parties shall be entitled to all the discovery provisions of Rules 26 through 37. Protective and enforcement orders shall be issued by a court of the county where discovery is being made or where the hearing is to be held.

⁵³315 N.E.2d at 403.

⁵⁴314 N.E.2d 79 (Ind. Ct. App. 1974).

⁵⁵Act of Aug. 28, 1950, ch. 809, § 351, 64 Stat. 555 (repealed, effective 1974). Title III, section 303(a) and (b) of the Social Security Amendments of 1972 provided for the repeal of the APTD program, effective January 1, 1974. However, the repeal does not apply to the Virgin Islands, Puerto Rico, or Guam.

⁵⁶At the time of DeVoux's application for aid, the state plan was required to grant "a fair hearing before the State agency to any individual whose claim for aid . . . is denied." Act of Aug. 28, 1950, ch. 809, § 351, 64 Stat. 555 (repealed, effective 1974).

United States Department of Health, Education, and Welfare.⁵⁷ The federal regulations governed the state hearing by reason of the supremacy clause of the United States Constitution.

The disposition of the case drew a divided court. The majority held that the superior court, where judicial review commenced, should dispose of the case by remanding it to the Department of Public Welfare for further consideration. The majority candidly based its decision on the Indiana Administrative Adjudication Act⁵⁸ despite their awareness of the explicit exclusion of the “*‘determination of eligibility and need for public assistance under the welfare laws’*” from coverage of the Act.⁵⁹ Although no specific statute governed the scope of review in this type of case and although the Act did not apply, “the standard and scope of judicial review set forth in that Act circumscribes the judgmental authority of the immediate reviewing court in such situations.”⁶⁰ Since the court chose to look to the Act for guidance, it might have gone further and cited the entire relevant language of the Act, which empowers the reviewing court to either remand the case or compel agency action unlawfully withheld.⁶¹

Although the majority’s rationale is unusual, the decision is not a bad one. The error at the administrative level was procedural. The majority simply seems to be saying that where procedural error occurs the case should be remanded to afford the agency an opportunity to correct the error. Hopefully, though, it will not become common practice for Indiana courts to apply a statute to a situation specifically excluded from the coverage of the statute—especially where the court applies only a selected part of the statute.

Judge White based his dissent in *DeVoux* principally on the standard of review of the court of appeals. As noted above, the Act authorizes the immediate reviewing court to compel agency action unlawfully withheld as an alternative to remanding the case to the agency. Judge White stated that the superior court did compel agency action. If the superior court was governed by the Act, it acted in accordance with its terms.

⁵⁷45 C.F.R. § 205.10 (1974).

⁵⁸IND. CODE §§ 4-22-1-1 *et seq.* (Burns 1974) [hereinafter referred to as the Act].

⁵⁹314 N.E.2d at 86 n.5, *quoting from* IND. CODE § 4-22-1-2 (Burns 1974) (emphasis supplied by the court).

⁶⁰314 N.E.2d at 86.

⁶¹IND. CODE § 4-22-1-18 (Burns 1974) provides in pertinent part: “The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.”

In *Taxpayers Lobby of Indiana, Inc. v. Orr*,⁶² the Indiana Supreme Court considered a judicial challenge to Governor Bowen's tax package. The tax package increased the state sales tax from two percent to four percent and created a new exemption from the tax for sales of food for human consumption. The plaintiff alleged that the food exemption constituted an unconstitutional delegation of legislative authority because it did not contain adequate standards.⁶³ The court stated the general rule as follows:

The only limitation on the delegation of authority to administrative bodies is that reasonable standards must be established to guide the administrative body. The standards, however, only need to be specific as the circumstances permit, considering the purpose to be accomplished by the statute.⁶⁴

The opinion suggests that "workable" standards meet the specificity requirement. In *Orr* the court found as workable standards two lists, detailing food items which are included in the exemption and those which are excluded.⁶⁵ The lists apparently constituted standards by example. They serve as a guide as to whether a specific item should be included or excluded.

In *Jenkins v. Hatcher*⁶⁶ the plaintiff was demoted from battalion chief of the Gary Fire Department. He alleged that the demotion without a hearing violated his due process rights under the fourteenth amendment to the United States Constitution and a provision of the Indiana Code.⁶⁷ A divided Third District Court of Appeals affirmed the circuit court's summary judgment for the

⁶²311 N.E.2d 814 (Ind. 1974).

⁶³See note 16 *supra*.

⁶⁴311 N.E.2d at 819 (citations omitted).

⁶⁵IND. CODE § 6-2-1-39(b) (20) (Burns Supp. 1975).

⁶⁶322 N.E.2d 117 (Ind. Ct. App. 1975).

⁶⁷Jenkins' complaint alleged that no evidence was presented supporting his demotion so that his demotion violated both the due process clause of the fourteenth amendment and Indiana Code section 18-1-11-3, which provides in relevant part:

Every member of the fire and police forces . . . shall hold office until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member . . . and after opportunity for hearing is given, if demanded, and the written reasons for such removal shall be entered upon the records of such board. . . . [U]pon a finding and decision of the board that any such member has been or is guilty of neglect of duty, or of the violation of rules . . . such commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal, or by reducing him or her to a lower grade and pay.

IND. CODE § 18-1-11-3 (Burns 1974).

defendant. The majority held that the statute relied upon by the plaintiff applied to "removal" but not to demotion. Judge Staton, dissenting, contended that the plaintiff was statutorily entitled to a hearing before being demoted. More importantly, Judge Staton argued that the plaintiff's complaint properly alleged a due process issue, which the circuit court and the majority in the appellate court ignored. Judge Staton would have held that the plaintiff's interest in maintaining his position as battalion chief was an interest protected by the fourteenth amendment and that this interest could have been infringed upon only in a manner consistent with due process.⁶⁸

E. Municipal Corporations

In *Ballard v. Board of Trustees*,⁶⁹ the plaintiff, a retired policeman, drew a disability pension from the Evansville police pension fund until the time of his conviction in Arizona on a charge of second degree murder. The board of trustees of the fund then terminated his pension under the Indiana Code provision which permits the board to discontinue or reduce the benefits of any person convicted of a felony.⁷⁰ Plaintiff challenged the provision, alleging that it constituted a "forfeiture of estate" in violation of article 1, section 30 of the Indiana Constitution.⁷¹ Though the court of appeals agreed with the plaintiff, the Indiana Supreme Court reversed.

The court gave two reasons to support its holding that the provision did not constitute a forfeiture of estate. First, the individual employee had no choice but to contribute part of his salary to the pension plan. Under such an involuntary plan, an individual has no vested right in the money. Therefore, according to the qualifications in the statute, the trustee at his discretion could divest

⁶⁸"Jenkins' statutorily created right to be free from arbitrary state action adversely affecting his public employment is an interest protected by the Fourteenth Amendment." 322 N.E.2d at 124 (Staton, J., dissenting) (citations omitted). See *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) ("When protected interests are implicated, the right to some kind of hearing is paramount."); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). See also note 78 *infra*.

⁶⁹324 N.E.2d 813 (Ind. 1975).

⁷⁰IND. CODE § 19-1-24-5 (Burns 1974). The provision reads in relevant part as follows:

Whenever any person who shall have received any benefit from such fund shall be convicted of a felony . . . said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter

⁷¹"No conviction shall work corruption of blood, or forfeiture of estate." IND. CONST. art 7, § 20.

the plaintiff of any interest he had in the plan.⁷² The court based this part of its decision upon the antiquated and generally discredited right-privilege distinction.⁷³ Although the court called the pension a "gratuity," the same rationale would apply if the court had termed it a privilege. As is commonly found in right-privilege cases, the court stated that "[plaintiff] could have refused the proffered employment."⁷⁴ Since it is a gratuity-privilege, and not a right, the pension may be given or withheld on such terms as the state dictates.

As a second and sounder basis for its holding, the court found that the termination of the pension did not constitute a forfeiture of estate because the statute did not provide for forfeiture and because the pension probably did not constitute an estate at all.⁷⁵ This reasoning met the plaintiff's challenge squarely and sufficiently disposed of the case. The inclusion in the opinion of language characterizing the pension as a gratuity was thus unfortunate. It is a long outdated principle that a pension to which an employee has contributed throughout his career comprises a gratuity, to be granted or withheld according to conditions unilaterally imposed by the state, merely because the employee could refuse to accept proffered employment. The administration of the pension plan by a state agency should be subject to constitutional restraint under *Board of Regents v. Roth*⁷⁶ and *Perry v. Sindermann*.⁷⁷ This would require recognition that a plaintiff's interest in a pension constitutes property that is subject to the due process protections of the fourteenth amendment.⁷⁸ Such recognition would not change

⁷²324 N.E.2d at 815.

⁷³See *Board of Regents v. Roth*, 408 U.S. 564, 571 n.9 (1972), for a discussion obliterating the right-privilege distinction.

⁷⁴324 N.E.2d at 816.

⁷⁵*Id.* at 816-17.

⁷⁶408 U.S. 564 (1972).

⁷⁷408 U.S. 593 (1972).

⁷⁸As the Supreme Court noted in *Roth*, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." 408 U.S. at 569. The range of property interests is broad and extends well beyond ownership of real estate, chattels or money. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (nontenured college professor); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare recipients). The property interest arises from "a legitimate claim of entitlement to [the benefit]." 408 U.S. at 577. But there must be "more than an abstract need or desire for [the benefit]. . . . more than a unilateral expectation . . ." *Id.* As to the requirements of a hearing and the balancing of the interests involved, the *Roth* Court stated: "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing . . ." *Id.* at 570 n.7. "The formality and procedural requisites for the hearing can vary, depending upon the importance

the outcome of *Ballard* since the court found that the plaintiff had no property interest at all.

In *Ott v. Johnson*⁷⁹ the Supreme Court of Indiana interpreted a provision of a town ordinance defining a "mobile dwelling."⁸⁰ The court of appeals had affirmed the circuit court's holding that the unit in dispute did not come within the definition contained in the ordinance. The supreme court reversed, saying that since the language of the ordinance was "clear and unambiguous," it was improper for the circuit court and the court of appeals to look to the intent of the city council for assistance in interpreting the ordinance.

Two cases considered aspects of statutory annexation procedures. In *Harris v. City of Muncie*,⁸¹ the Second District Court of Appeals held that Indiana Code section 18-5-10-25 requires that a remonstrance against an annexation must be sustained regardless of whether the affected area is rural or urban if the annexing city has not developed a fiscal plan and established a definite policy for providing services to that area.⁸² The city contended that the statute

of the interests involved and the nature of the subsequent proceedings.'" *Id.* at 570 n.8, quoting from *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

⁷⁹319 N.E.2d 622 (Ind. 1974).

⁸⁰*Pierceton, Ind., Town Ordinance No. 114 (1967), quoted at 319 N.E.2d 623, defines "mobile home" as follows:*

A mobile dwelling unit shall name [*sic*] living quarters such as house trailers . . . which may be moved by tractor, truck, automobile or horses or can be carried, transported or towed from one place to another without the use of regular house moving equipment

The mobile home in question was a unit 12 feet wide and 61 feet long and was constructed at the factory as a single and complete unit equipped with three axles, six automobile wheels, brakes, brake lights, traveling lights, and a tongue for towing. The unit so equipped was towed by a truck from the mobile home park to Appellee's lot, where the tongue, wheels and axles were removed and the unit placed on concrete block walls.

⁸¹325 N.E.2d 208 (Ind. Ct. App. 1975).

⁸²*Id.* at 209-10. IND. CODE § 18-5-10-25 (Burns 1974) provides in part:

The judge of the circuit or superior court shall, upon the date fixed, proceed to hear and determine the appeal without the intervention of jury, and shall, without delay, give judgment upon the question of the annexation according to the evidence which either party may introduce. If the evidence establishes that:

(a) The resident population of the area sought to be annexed is equal to at least three [3] persons for each acre of land included within its boundaries or that the land is zoned for commercial, business or industrial uses or that sixty per cent [60%] of the land therein is subdivided; and

does not require such a fiscal plan when the area to be annexed meets the alternative statutory standard that the area be bordered on one-fourth of its boundaries by the city and be needed by the city for future development.⁸³ The court rejected that contention and held that the land could not be annexed unless the city had met the requirement of developing a fiscal plan and policy to provide services to that area.⁸⁴

In *Ensweiler v. City of Gary*,⁸⁵ plaintiff petitioned the Third District Court of Appeals to affirm its appellate jurisdiction on the basis of the Indiana Code provision that "pending the appeal, and during the time in which the appeal may be taken, territories sought to be annexed shall not be deemed a part of the annexing city."⁸⁶ As seen by the court of appeals, the issue involved whether the term "pending appeal" encompassed only proceedings conducted in trial courts or whether the phrase embraced the entire appellate process. In denying the application for extraordinary relief on the ground that an appropriate case for relief had not been presented, the court nevertheless held for the broader interpretation of "pending appeal."

(b) At least one-eighth [1/8] of the aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; and

(c) The annexing city has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three [3] years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary service furnished by the annexing city to other areas of the city which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed; the court shall order the proposed annexation to take place notwithstanding the provisions of any other law of this state.

If, however, the evidence does not establish all three [3] of the foregoing factors the court shall sustain the remonstrance and deny annexation unless the area although not meeting the conditions of factor (a) *supra* is bordered on one-fourth [1/4] of its aggregate external boundaries by the boundaries of the city and is needed and can be used by the city for its future development in the reasonably near future, the court may order the proposed annexation to take place notwithstanding the provisions of any other law of this state. . . . Pending the appeal, and during the time within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing city.

⁸³325 N.E.2d at 209.

⁸⁴*Id.* at 212.

⁸⁵325 N.E.2d 507 (Ind. Ct. App. 1975).

⁸⁶IND. CODE § 18-5-10-25 (Burns 1974). See note 82 *supra*.

III. Business Associations

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There were a number of significant judicial and legislative developments in the corporate and business association area during the past year. Unfortunately, space limitations preclude anything more than an overview.¹

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The author wishes to express his appreciation to Richard Samek for his assistance in preparing this survey of business association developments.

¹There are several cases that warrant at least passing reference in this survey. One is *Warner v. Young Am. Volunteer Fire Dep't*, 326 N.E.2d 831 (Ind. Ct. App. 1975), a per curiam affirmance of a denial of defendant's motion for relief from judgment pursuant to Indiana Rule of Trial Procedure 60(B) because he had failed to preserve and present any issues for appeal. See generally 4 W. HARVEY & R. TOWNSEND, *INDIANA PRACTICE* 196-201, 204-05, 208-23 (1971). One of the issues the defendant attempted to raise was that the judgment was void because the complaint was not in the correct corporate name of the plaintiff, an Indiana not-for-profit corporation. The court held that failure to plead the affirmative defense of plaintiff's lack of capacity to sue waived the defense. Also, the minor variance between the true corporate name and the name as styled in the complaint was of no legal significance since defendant was well aware of plaintiff's identity. For a discussion of the consequences of misnaming a corporate party to a law suit see 9 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 4492, 4494, 9545 (perm. ed. rev. 1964) [hereinafter cited as FLETCHER]. For a general discussion of the capacity of corporations to sue and be sued see *id.* §§ 4215, 5226-27; H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* §§ 80, 352 (2d ed. 1970) [hereinafter cited as HENN]. See also IND. CODE § 23-1-2-2(b) (2) (Burns 1972).

Also of some interest is *Tindall v. Enderle*, 320 N.E.2d 764 (Ind. Ct. App. 1974) (Staton, J.), where the court recognized the distinct tort theory that imposes liability on an employer who negligently hires an employee with negligent or violent proclivities. See *Broadstreet v. Hall*, 168 Ind. 192, 80 N.E. 145 (1907). However, the *Tindall* court, in affirming a judgment for defendants, held that the tort theory applies only in special circumstances and not where, as in the instant case, the employer has stipulated the employee was acting within the scope of employment. In such situations the plaintiff is limited by the traditional doctrine of respondeat superior. See *Lange v. B & P Motor Express, Inc.*, 257 F. Supp. 319 (N.D. Ind. 1966). The court noted that many decisions failed to differentiate between the two doctrines, see cases cited at 320 N.E.2d at 768 n.5, but concluded that permitting a plaintiff to prove the negligent hiring theory after prevailing on respondeat superior would be a waste of judicial resources and might unduly prejudice the defendant. It would be appropriate, though, where there was a request for punitive damages. The court left open the issue of what would occur when the alternative theories of negligent hiring and respondeat superior were raised and the employer refused to stipulate that the employee was acting within the scope of employment. 320 N.E.2d at 768 n.6. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 61, 69 (4th ed. 1971); *RESTATEMENT (SECOND) OF*

A. Trust Fund Theory

The trust fund theory of capital was involved in *Abrahamson*

TORTS §§ 315, 317 (1965); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 82B (1964); 53 AM. JUR. 2D *Master and Servant* §§ 422, 458 (1970); Annot., 34 A.L.R.2d 372 (1954).

Mishawaka Fed. Sav. & Loan Ass'n v. Brademas, 319 N.E.2d 674 (Ind. Ct. App. 1974), is a case touching on partnership authority. The court held that the general partners of a limited partnership, which in turn was the general partner of a second limited partnership, had the authority to execute and acknowledge a mortgage binding both limited partnerships. Since the mortgage was within the scope of the partnership business, the general partner as agent could bind the partnership. See IND. CODE §§ 23-4-1-9, -2-9 (Burns 1972). See generally J. CRANE & A. BROMBERG, PARTNERSHIP §§ 48-50 (1968) [hereinafter cited as CRANE & BROMBERG]. The actual limited partners of the two limited partnerships would not be bound as such by the obligations, see IND. CODE § 23-4-2-1 (Burns 1972), unless they sacrificed their protected status by taking part in the control of the business. *Id.* § 23-4-2-7. See generally 1 CAVITCH, BUSINESS ORGANIZATIONS § 12.02[3] (rev. ed. 1975) [hereinafter cited as CAVITCH]; 2 *id.* § 39.01; CRANE & BROMBERG § 26; HENN §§ 28-36; N. LATTIN, THE LAW OF CORPORATIONS § 7 (2d ed. 1971) [hereinafter cited as LATTIN]. The current Indiana Uniform Partnership Act, IND. CODE §§ 23-4-1-1 to -43 (Burns 1972), and the Code sections dealing with limited partnerships, *id.* §§ 23-4-2-1 to -31, are based on the Uniform Partnership Act and the Uniform Limited Partnership Act. For a discussion of the prior Indiana statutes on limited partnerships, ch. 82, § 2, [1859] Ind. Acts 131, as amended ch. 80, §§ 1-10, [1903] Ind. Acts 308 (repealed 1949), see Brown, *The Limited Partnership in Indiana*, 5 IND. L.J. 421 (1930).

A federal case with Indiana connections and some interesting observations on the Indiana General Corporation Act, IND. CODE §§ 23-1-1-1 to -12-6 (Burns 1972), is *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). *Schlick* was a suit brought by a minority shareholder of a publicly-held Indiana corporation alleging that a merger of that corporation into its controlling shareholder violated the common law and the antifraud and proxy provisions of the Securities Exchange Act of 1934 and its implementing rules. 15 U.S.C. §§ 78j(b), 78n(a) (1970); 17 C.F.R. §§ 240.10b-5, .14a-9 (1974). In holding that plaintiff's complaint was sufficient to withstand a motion to dismiss, the Second Circuit Court of Appeals posited that the rationale denying appraisal rights to dissenting shareholders of publicly traded corporations, see IND. CODE § 23-1-5-7 (Burns 1972), might not exist where the market price of those shares had been manipulated so as not to reflect their true value. 507 F.2d at 377 n.6. For a discussion of the appraisal remedy, perhaps more aptly called the shareholders right to dissent, see 6 CAVITCH § 112; 13 FLETCHER §§ 5906.1-.17; HENN § 349; LATTIN § 161. The remedy has generated considerable academic comment. See articles cited in HENN § 349, at 724 nn.1 & 3. For a discussion of the Indiana appraisal procedure see *Apartment Properties, Inc. v. Luley*, 143 Ind. App. 227, 239 N.E.2d 403 (1968), *rev'd*, 252 Ind. 201, 247 N.E.2d 71 (1969); *Shaffer v. General Grain, Inc.*, 133 Ind. App. 598, 182 N.E.2d 461 (1962).

In *United Hosp. Serv. Inc. v. United States*, 384 F. Supp. 776 (S.D. Ind. 1974), the court held that a corporation organized under the Indiana Not-for-Profit Corporation Act of 1971, IND. CODE §§ 23-7-1.1-1 to -66 (Burns 1972),

v. Levin,² where the Third District Court of Appeals affirmed a summary judgment entered against Leo Abrahamson by the Lake Superior Court. The suit was an interpleader action brought by a bank to determine who was entitled to certain corporate funds. It arose out of efforts by Lillian and Saul Levin to satisfy debts owing by Abrahamson Motor Sales, Inc. The Levins were shareholders, directors, and officers of the corporation, as were Lillian's two brothers, Leo and Jack Abrahamson.³ The opinion does not specifically state that the corporation was insolvent, but it clearly was in financial difficulty. In fact, it was being, or at least had been, kept afloat by loans from the Levins and from Leo Abrahamson. The loans were evidenced by demand notes executed by the corporate officers, although the court indicated that the loans had been made and in some cases repaid without formal action by the board of directors.⁴

In September 1968, the Levins drew a check for \$22,284.69 on the corporation's checking account at a time of pressing financial difficulties for the corporation. The check was in repayment of the balance of the loans made by the Levins. The bank refused to honor the check until bank loans had been repaid pursuant to a subordination agreement executed by the four. It did agree to place the funds in an escrow savings account until the debt was satisfied, but it still refused to pay over the funds at that point because Leo Abrahamson had advised the bank that there were other claimants to the funds. To avoid the possibility of double liability, the bank filed an interpleader action naming the four individuals and the corporation as defendants and paid the disputed funds into the court.

Initially, the two Abrahamsons and the corporation claimed the funds, thus denying the Levins' claim. Each group filed a cross-complaint against the other. The Levins moved for summary judgment and then filed their cross-complaint solely against Leo, inasmuch as Jack Abrahamson and the corporation had withdrawn from the litigation by that time. Leo Abrahamson, along with a corporate creditor permitted to intervene, opposed the summary judgment motion to no avail, and the funds were ordered paid to the Levins. In so ruling, the trial court emphasized that Leo's cross-complaint for his loans was against the *corporation* and not against the fund on deposit. The court of appeals noted that Leo's

to furnish laundry service to several hospitals was an exempt charitable organization under sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954, and therefore was entitled to a refund of taxes paid.

²319 N.E.2d 351 (Ind. Ct. App. 1974) (Hoffman, C.J., Staton, J., concurring with opinion).

³*Id.* at 352.

⁴*Id.* at 352-53.

cross-complaint alleged that the Levins' efforts to be repaid had not been approved by the directors or the officers, which was an improper effort to become preferred creditors to the detriment of Leo and others. Therefore, the funds on deposit should be used to pay the claims of corporate creditors, including Leo, with any balance being paid pro rata to the four shareholders. In other words, Leo was claiming as a general creditor of the corporation and not in any corporate capacity.

This might have been a tactical error on Abrahamson's part.⁵ As the court of appeals pointed out he was

not attempting to execute upon alleged corporate assets to satisfy a judgment lien against the corporation. And, it is apparent that appellant's cross-complaint does not state a derivative cause of action seeking to recover the funds paid into the trial court for the benefit of the corporation by reason of his status as a shareholder. Furthermore such cross-complaint does not seek the appointment of a receiver to preserve or liquidate the assets of the corporation for the benefit of its creditors. Rather, it avers only the detriment suffered by appellant as a creditor of the corporation as a basis for requesting the trial court to set aside the preference inuring to the Levins as fully reimbursed creditors of the corporation.⁶

Instead of utilizing these approaches, Abrahamson sought to proceed under the equitable trust fund theory, where the capital stock of a corporation or the assets of an insolvent corporation representing the stock is considered a *res* or trust fund for the benefit of creditors.⁷ The theory was first applied in the 1824 case of *Wood v. Dummer*.⁸ Justice Story posited that corporate creditors rely on the capital stock or assets for repayment, so both legal principle and common sense mandate that the fund be set apart and pledged for the payment of debts. Thus creditors are given additional security and protection against overreaching by a corporation or its principals, since no liens or preferences can be created either voluntarily or by operation of law favoring a cred-

⁵The intervening creditor, of course, had no choice. That creditor did not appeal.

⁶319 N.E.2d at 354.

⁷See *Valhalla Memorial Park Co. v. Lowery*, 209 Ind. 423, 428, 199 N.E. 247, 249 (1936); *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 159 Ind. 614, 64 N.E. 870 (1902); 15A FLETCHER § 7369. See generally 7 CAVITCH § 155.02, at 155-57; 15A FLETCHER §§ 7369-89; HENN § 171; R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS § 190 (2d ed. 1949); Johnson, *Is the Trust Fund Theory of Capital Stock Dead?*, 34 ACCOUNTING REV. 607 (1959).

⁸30 F. Cas. 435 (No. 17,944) (C.C.D. Me. 1824).

itor once insolvency occurs.⁹ However, the fund is only an aid in reaching assets. No express trust is established,¹⁰ and creditors do not have any right, without more, to interfere in corporate operations.¹¹ It is also a doctrine that has not been well received by the courts in Indiana or in other jurisdictions.¹²

The *Abrahamson* court cited and relied on the leading Indiana case on point, *Nappanee Canning Co. v. Reid, Murdoch & Co.*,¹³ where the Indiana Supreme Court considered and ostensibly rejected the doctrine. The attitude of the *Nappanee* court was that corporate creditors should be aware that the assets of an insolvent corporation may be applied to pay or secure debts due favored creditors. Creditors presumably bargain at arm's length, and when creditors extend credit, they are subject to the corporation's right to grant creditor preferences.¹⁴ This is true even if the creditor was a director or officer, including an interested director who had voted to grant the preference.¹⁵

The *Nappanee* court did recognize that a corporation in receivership or otherwise subject to the equity jurisdiction of the courts could not grant preferences. This lends support to Fletcher's postulate that many courts rejecting the theory are only repudiating it in its broadest application, where creditors could claim a lien or interest in the assets of a solvent, viable corporation, or where the trust would be imposed simply because the enterprise is

⁹See *id.*; 15A FLETCHER §§ 7369-71, 7374, 7376, 7380-83. Since the doctrine was first announced in a case involving an insolvent bank, it has frequently been applied to financial institutions. *Id.* § 7369, at 49 n.49. See also *Miller v. First Nat'l Bank*, 103 Ind. App. 99, 1 N.E.2d 671 (1936).

¹⁰See, e.g., *Shoen v. Sioux Falls Gas Co.*, 63 S.D. 527, 261 N.W. 393 (1935). See generally 15A Fletcher §§ 7375-76.

¹¹Thus a creditor cannot enjoin improvident contracts or conveyances unless intended to defraud creditors. *Sweeney v. Happy Valley, Inc.*, 18 U.2d 113, 417 P.2d 126 (1966); 15A FLETCHER § 7377.

¹²See, e.g., *Automatic Canteen Co. of America v. Wharton*, 358 F.2d 587 (2d Cir. 1966); *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 159 Ind. 614, 64 N.E. 870 (1902); *Nathan v. Lee*, 152 Ind. 232, 52 N.E. 987 (1899); *Levering v. Bimel*, 146 Ind. 545, 45 N.E. 775 (1897); *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N.E. 329 (1913). Fletcher considers Judge Mitchell's opinion in *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N.W. 1117 (1892), as the best statement rejecting the trust fund concept, although recognizing that creditors are entitled to some protection against corporate overreaching. 15A FLETCHER §§ 7384-85. Fletcher lists the jurisdictions rejecting the doctrine in *id.* § 7385, at 79 n.19.

¹³159 Ind. 614, 64 N.E. 870 (1902) (one judge dissented).

¹⁴*Id.* at 621-23, 64 N.E. at 872-73.

¹⁵The lower Indiana courts were not uniformly hospitable to *Nappanee*. In *City Nat'l Bank v. Goshen Woolen Mills Co.*, 34 Ind. App. 562, 69 N.E. 206 (1904), the court analyzed and criticized *Nappanee* and suggested that it be repudiated. However, the *Goshen* case was transferred to the supreme court, which reaffirmed its earlier decision. 163 Ind. 214, 71 N.E. 652 (1904).

insolvent.¹⁶ The United States Supreme Court aptly described the theory when it posited that it was not a trust that attached to the property as such for the benefit of creditors or shareholders, but rather was a trust in administering assets after possession by an equity court.¹⁷

It is interesting to note that the *Abrahamson* court did not cite *Automatic Canteen Co. of America v. Wharton*,¹⁸ a federal case applying Indiana law. *Canteen* involved the propriety of transferring a vending company route from an Indiana subsidiary corporation to a parent corporation. The Second Circuit Court of Appeals acknowledged that Indiana was among those jurisdictions rejecting the trust fund theory; therefore, directors do not have to treat all creditors alike even after insolvency. However, it went on to distinguish the situation involving a favored creditor, even an officer or director, from the situation where assets are being distributed as dividends to the shareholders. The court concluded, citing *Fricke v. Angemeier*¹⁹ and *State ex rel. Thompson v. City of Greencastle*,²⁰ that a creditor could trace the assets to the shareholders notwithstanding the repudiation of the trust fund theory. The *Canteen* court imposed a constructive trust on the assets in favor of the creditor, concluding that Indiana's rejection of the theory was not so conclusive that a creditor would not be protected under these circumstances. The court's statement that directors of an insolvent corporation have a fiduciary duty to creditors comparable to the duty owed by directors of a solvent corporation to the corporation and its shareholders²¹ is not truly consistent with *Nappanee* where the court stated that "[t]he directors of a manufacturing corporation are not the agents or trustees of the creditors, but are simply and solely the representatives of the stockholders and of the corporation."²² However, *Canteen's* proposition that creditors would be protected by Indiana courts even if there is no fiduciary duty as such is probably correct since

¹⁶15A FLETCHER §§ 7374, 7376, 7379-82, 7385-86. See *Miller v. First Nat'l Bank*, 103 Ind. App. 99, 1 N.E.2d 671 (1936); *Marcovich v. O'Brien*, 63 Ind. App. 101, 114 N.E. 100 (1910). See also 7 CAVITCH § 155.02; HENN § 171.

¹⁷*Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371 (1893).

¹⁸358 F.2d 587 (2d Cir. 1966).

¹⁹53 Ind. App. 140, 101 N.E. 329 (1913). After recognizing the effect of *Nappanee*, the *Fricke* court held that dividends paid by an insolvent corporation could be recovered from shareholders by the receiver. *Fricke* was cited in *Abrahamson*. 319 N.E.2d at 354.

²⁰111 Ind. App. 640, 40 N.E.2d 388 (1942). The *Thompson* court held that the shareholders of a corporation that had sold its assets were liable for unpaid corporate debts.

²¹358 F.2d at 590.

²²159 Ind. at 622, 64 N.E. at 873.

there are other theories available, and there is always receivership.²³

The *Abrahamson* court emphasized the passage in *Nappanee* that acquiescence by the corporation or its shareholders in disposing of corporate assets, including the satisfaction of just debts owing to directors or officers, precludes recovery by other creditors. It concluded *Abrahamson* had acquiesced by not having a receiver appointed or by otherwise causing a court of equity to acquire jurisdiction over the assets and, consequently, he and other creditors were without recourse.²⁴

A separate issue before the court in *Abrahamson* was the impact of the Indiana Code provision relating to assignments for the benefit of creditors.²⁵ The provision recognizes that debtors can prefer particular creditors under certain circumstances but provides that "no corporation shall in any case prefer any creditor where any *director* of the corporation is a surety on the indebtedness preferred"²⁶ The court acknowledged the provision but limited it because of the long standing rule permitting corporate preferences. *Travis v. Porter*,²⁷ where the statutory language was not applied to corporate officers, was cited in support. The provision is strictly construed and limited to director suretyships, and it would not be extended to the type of preferences involved in *Abrahamson*.

Finally, the court rejected *Abrahamson's* argument that, as interested persons, the Levins' conduct should be "closely scrutinized" to insure that the debt was actually due and that they were not abusing their position to the detriment of other creditors. *Abrahamson* urged *Bossert v. Geis*²⁸ as controlling. The court acknowledged the supportive language of *Bossert* but dismissed it as only an "objective test" to validate the good faith of director-corporation transactions at a time when such transactions were disfavored by the law. The *Abrahamson* court evidenced a clear recognition of the change in judicial attitude toward corporate conflicts of interest.²⁹ The court conceded that after a receiver has been ap-

²³Many of these theories, such as assignments for the benefit of creditors and fraudulent conveyances, are discussed in 15A FLETCHER. See also HENN § 171.

²⁴319 N.E.2d at 355.

²⁵IND. CODE § 32-12-1-1 (Burns 1973). See generally 15A FLETCHER §§ 7390 to 7406.1.

²⁶IND. CODE § 32-12-1-1 (Burns 1973) (emphasis added).

²⁷86 Ind. App. 369, 158 N.E. 234 (1927). Of course, fraudulent preferences are void. See, e.g., *Grubbs v. Morris*, 103 Ind. 166, 2 N.E. 579 (1885); *Lewis v. Citizens Bank*, 98 Ind. App. 655, 190 N.E. 453 (1934). See generally 15A FLETCHER § 7403.

²⁸57 Ind. App. 384, 107 N.E. 95 (1914).

²⁹The cases and commentary on director conflicts of interest and the

pointed, *Bossert* is appropriate in passing on the receiver's defenses to claims of directors as corporate creditors. Since no court had acquired equitable jurisdiction over the assets in *Abrahamson*, the scrutiny was inappropriate.

In the end, the court decided the ultimate issue revolved around which of the two groups had superior title to the fund. The judgment for the Levins was upheld because they had shown title and Abrahamson had not. Since he could prevail only on the strength of his own title and not on the defects, if any, in the Levins' title,³⁰ there was no genuine issue of material fact and summary judgment was proper.³¹

B. Joint Venture Liability

The scope of a joint venture and the relationship of the venturers to each other and to third persons was the issue before the First District Court of Appeals in *O'Hara v. Architects Hartung & Association*.³² The court affirmed a judgment of the Monroe County Superior Court in favor of Hartung in a suit to foreclose a mechanics' lien on real estate for architectural services.

Defendant O'Hara originally owned the real estate but conveyed it to defendant Wickes Corporation as part of an abortive arrangement for building an apartment. Wickes, which was in the building supply trade, was to supply the materials and O'Hara was to supervise. Problems with an earlier project of O'Hara and Wickes prompted them to agree to obtain detailed plans at the outset in order to accurately cost the project. According to the court, the evidence disclosed that a Wickes' employee requested O'Hara to employ an architect for the plans and indicated that Wickes would pay the fee. Hartung was retained. Sometime later he advised

validity of contracts between a corporation and an interested director are legion. Compare *Munson v. Syracuse, G. & C. Ry.*, 103 N.Y. 58, 8 N.E. 355 (1886), with *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wash. 2d 375, 391 P.2d 979 (1964). See generally 6 CAVITCH § 127.05; 3 FLETCHER §§ 913-88; HENN § 238; LATTIN § 80. For a list of articles discussing conflicts of interest see HENN § 238, at 465 n.1. One Professor Henn does not list, but which Professor Cary does in his encyclopedic corporations casebook, W. CARY, CASES AND MATERIALS ON CORPORATIONS 471 (4th ed. abr. 1970), is Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35 (1966), which sets forth the chronology of the decline alluded to by the *Abrahamson* court.

³⁰See *Lane v. Sparks*, 75 Ind. 278 (1881); *Aircraft Acceptance Corp. v. Jolly*, 141 Ind. App. 515, 230 N.E.2d 446 (1967).

³¹Judge Staton's concurring opinion lends credence to the proposition that Abrahamson made a tactical error in using the trust fund theory by emphasizing he had proceeded as a general creditor and had not sought relief in his shareholder or director capacity. 319 N.E.2d at 357.

³²326 N.E.2d 283 (Ind. Ct. App. 1975) (Lowdermilk, J.).

O'Hara of his various fee schedules and requested an initial payment. The letter was forwarded to Wickes, and a check was issued to Hartung by Wickes' area manager. Hartung completed the plans, but O'Hara and Wickes refused to pay the fee of \$5,810.50. Hartung then instituted the foreclosure suit.³³

O'Hara and Wickes raised two main arguments on appeal: (1) That there was no contract between Wickes, the record owner, and Hartung because the evidence failed to show that Wickes and O'Hara were involved in a joint business venture; and (2) that there could be no mechanics' lien as a matter of law since the services did not improve or add to the property. There was no dispute about an architect's right to secure and enforce a mechanics' lien since that right has been specifically granted by the legislature.³⁴

The court decided that the appellant's first argument assumed that a mechanics' lien may arise only from a contractual relationship. According to the court, this was a misconception, or at least it was to the extent that a formal contractual relationship was deemed needed. Judge Lowdermilk, writing for the court, first set forth the pertinent statutory provisions giving rise to the claim and then observed that the "statute," presumably referring to both the mechanics' lien statutes³⁵ and the architect's lien statute³⁶ does not "require" a contract.³⁷ A contract is the clearest basis for a

³³*Id.* at 285.

³⁴IND. CODE § 32-8-25-1 (Burns 1973). The statute does not spell out the specifics of the lien but rather grants registered architects, registered professional engineers, and registered land surveyors the right to enforce the same lien enjoyed by contractors and others. *Id.* §§ 32-8-3-1 *et seq.* The key is that the services must involve the practice of architecture which is defined by statute to include, among other activities, preliminary studies and the preparation of specifications and contract documents. *Id.* § 25-4-1-17 (Burns 1974). Although it is well established in Indiana that architects can be considered "laborers" under the statute, *Mann v. Schnarr*, 228 Ind. 654, 95 N.E.2d 138 (1950); *Beeson v. Overpeck*, 112 Ind. App. 195, 44 N.E.2d 195 (1942), there was some question as to whether all professional activities were covered. This could present a problem since mechanics' lien statutes, being in derogation of common law, are strictly construed and a person claiming the lien has the burden of proving the application of the statute. See *Puritan Eng'r Corp. v. Robinson*, 207 Ind. 58, 191 N.E. 141 (1934); *William F. Steck Co. v. Springfield*, 151 Ind. App. 671, 281 N.E.2d 530 (1972). See also *Kolan v. Culveyhouse*, 144 Ind. App. 249, 245 N.E.2d 683 (1969). An architect who drew plans and specifications but did not supervise the construction was denied a lien under the Alaska statute in *Rivers v. Pastro*, 11 Alaska 491 (1948). For a discussion of an architect's rights to enforce mechanics' liens see *Annot.*, 28 A.L.R.3d 1014 (1969); 5 AM. JUR. 2d *Architects* §§ 20-22 (1962).

³⁵IND. CODE §§ 32-8-3-1 to -15 (Burns 1973).

³⁶*Id.* § 32-8-25-1. See note 34 *supra*.

³⁷In one respect the mechanics' lien statutes do require a formal undertaking. Section 32-2-3-1 specifies that "no lien" contracts are valid only if in

lien,³⁸ but the relationship need not be that formal. It is sufficient if the landowner is aware of and actively consents to the furnishing of service or supplies.³⁹ Passive consent or mere acquiescence will not suffice. For example, record owners of land occupied by others were not bound by a mechanics' lien where they had no knowledge that work was being done on the premises.⁴⁰ As was pointed out in *Courtney v. Luce*,⁴¹ a case relied on in *O'Hara*, the key is whether the "materials [were] furnished or labor performed by the authority and direction of the owner"⁴² The doctrine that a contractual relationship is irrelevant to a lien was recently reaffirmed in *Saint Joseph's College v. Morrison, Inc.*,⁴³ where the statutory requirements were deemed satisfied when the mechanic notified the landowner of the lien.

The court acknowledged that there was some conflict in the record as to whether Wickes had actively consented to Hartung's employment. Starting with the premise that the judgment of the lower court would not be disturbed if it was supported by the evidence, viewing the evidence in a light most favorable to Hartung's position,⁴⁴ the court concluded that there was sufficient evidence to show that Wickes gave active consent to Hartung. Even though Hartung was contacted by O'Hara, the court considered Wickes' making of the initial payment without questioning Hartung's services and fees as showing the requisite acquiescence.

A separate ground for affirmance was that the evidence supported the finding that O'Hara and Wickes were engaged in a joint venture to build the apartment. Once this was established it automatically followed that Wickes was bound by O'Hara's act of retaining Hartung if it was within the scope of the enterprise.⁴⁵ The

writing. IND. CODE § 32-8-3-1 (Burns 1973). See *Baldwin Locomotive Works v. Edward Hines Lumber Co.*, 189 Ind. 189, 127 N.E. 275 (1920).

³⁸*Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865, 873 (Ind. Ct. App. 1973).

³⁹See *Courtney v. Luce*, 101 Ind. App. 622, 200 N.E. 501 (1936); *Robert Hixon Lumber Co. v. Rowe*, 83 Ind. App. 508, 149 N.E. 92 (1925).

⁴⁰*Woods v. Deckelbaum*, 244 Ind. 260, 191 N.E.2d 101 (1963).

⁴¹101 Ind. App. 622, 200 N.E. 501 (1936).

⁴²*Id.* at 626, 200 N.E. at 503.

⁴³302 N.E.2d 865 (Ind. Ct. App. 1973). The case is discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 234, 253 (1974). For a general discussion of the contractual requirements for mechanics' liens see 53 AM. JUR. 2d *Mechanics' Liens* §§ 113-18 (1970).

⁴⁴See *Phar-Crest Land Corp. v. Therber*, 251 Ind. 674, 244 N.E.2d 644 (1969); *A.S.C. Corp. v. First Nat'l Bank*, 241 Ind. 19, 167 N.E.2d 460 (1960); *Harris v. Second Nat'l Bank*, 146 Ind. App. 468, 256 N.E.2d 594 (1970). See generally 3 W. HARVEY, *INDIANA PRACTICE* 420-30 (1970).

⁴⁵See *Hogle v. Reliance Mfg. Co.*, 113 Ind. App. 488, 48 N.E.2d 75 (1943). See also *Bushman Constr. Co. v. Air Force Academy Housing Inc.*, 327 F.2d

easily found that a request for architectural plans was within the scope of the venture. The *O'Hara* court recognized that a joint venture is an association of two or more persons combining property and services to carry out a single business enterprise for profit.⁴⁶ The joint venture form of organization is frequently found in the construction areas.⁴⁷

A joint venture is a form of business akin to a partnership, differing only, if there is any difference, in its more limited scope. The distinction between a partnership and a joint venture has generated some academic debate,⁴⁸ but as Professors Crane and Bromberg point out in their treatise on partnership, the debate is truly "academic," since partnership rules apply whether it is a species of partnership or merely analogous to one.⁴⁹ Like a partner, a joint venturer is liable for venture debts incurred within the scope of the venture. The *O'Hara* court further recognized that in a joint venture each party must have some control over the enterprise and share in profits and losses. This is conventional wisdom, since without co-ownership there would be a principal-agent relationship.⁵⁰ Here the evidence that defendants were pooling capital, talent, and material for the apartment sufficed to show a joint venture.

The court then considered and rejected the appellant's second contention that a lien could not attach because the land had not been "improved" by Hartung's services since the building was never erected. As a general proposition the materials or services must be used in a building or project before the lien attaches, but there are exceptions, sometimes on an estoppel basis. This will preclude injustice where an owner may have failed to complete the work⁵¹ and thereby try to avoid the mechanics' lien. This exception is particularly significant for architectural services, which are substantially completed before the construction starts. However, the court seemed to require a nexus between the plans and the project

481 (10th Cir. 1964). See generally 1 CAVITCH § 41.10[1]; CRANE & BROMBERG § 35, at 192-94; HENN § 49.

⁴⁶326 N.E.2d at 286. The court cited in support *Indiana Gross Income Tax Div. v. Musselman*, 141 Ind. App. 36, 212 N.E.2d 407 (1965); *Baker v. Billingsley*, 126 Ind. App. 703, 132 N.E.2d 273 (1956). See generally CRANE & BROMBERG § 35; HENN § 49.

⁴⁷See examples cited in CRANE & BROMBERG § 35, at 189 n.84.

⁴⁸See articles cited *id.* at 189 n.82, 190 n.84. See also *Tufts v. Mann*, 166 Cal. App. 170, 2 P.2d 500 (1931).

⁴⁹CRANE & BROMBERG § 35, at 192-95.

⁵⁰See *Baker v. Billingsley*, 126 Ind. App. 703, 132 N.E.2d 273 (1956); CRANE & BROMBERG § 35, at 191.

⁵¹The court cited and relied on *Scott v. Goldinghorst*, 123 Ind. 268, 24 N.E. 333 (1889), and *Jackson v. J.A. Franklin & Son*, 107 Ind. App. 38, 23 N.E.2d 23 (1939). See generally Annot., 1 A.L.R.3d 822 (1965).

before the lien attaches. The nexus clearly existed in *O'Hara*, since the plans were drawn up to facilitate accurate cost estimates for the project, and it was a fair conclusion that the plans were used by the defendants in making decisions.

C. Partnership Status

A family dispute involving a partnership, or purported partnership, resulted in *Puzich v. Pappas*⁵² where the Third District Court of Appeals reversed the Porter County Superior Court in an action brought by Puzich's three brothers, the defendants Pappas, to dissolve a partnership operating a family business, to obtain an accounting for partnership profits, and to appoint a receiver. Puzich filed a counterclaim requesting similar relief. The parties stipulated that the only issue before the trial court was whether Puzich was a partner. The trial court ruled against Puzich. On appeal she raised two issues: (1) Did a 1958 release affect her partnership status, and (2) did the evidence and all reasonable inferences lead to the conclusion that she was a partner. In reversing, the court of appeals held that the sole conclusion from the evidence was that she was a partner and that the release did not have any prospective effect.

The release issue was summarily handled by the court. Judge Staton, for the court, noted that it was executed when Puzich was having domestic troubles and was designed to prevent her husband from claiming against her interest. There was no evidence that the parties intended the release to have a prospective effect on her interests after it was signed in March 1958. In fact, the language specifically provided that it covered the period "from the beginning of the world to the date of these presents."⁵³ Also, she continued to work in the business after signing the release. It is a well-settled and fundamental rule of construction of releases that the intention of the parties controls⁵⁴ and that a party seeking the protection of a release must plead and prove it.⁵⁵

The evidence relating to the issue of release was also pertinent in determining Puzich's status as a partner. The court noted that she had worked in the business for a number of years, but following her mother's death, her brothers restricted her activities

⁵²314 N.E.2d 795 (Ind. Ct. App. 1974) (Staton, J.).

⁵³*Id.* at 796. Presumably a prospective intention would have run to the end of the world.

⁵⁴*See* *Landers v. McComb Window & Door Co.*, 145 Ind. App. 38, 248 N.E.2d 358 (1969) (cited by the *Puzich* court); *Gates v. Fauvre*, 74 Ind. App. 382, 119 N.E. 155 (1920). *See generally* 66 AM. JUR. 2D *Release* § 30 (1973).

⁵⁵*See* *Thanos v. Fox*, 128 Ind. App. 416, 149 N.E.2d 315 (1958). *See generally* 66 AM. JUR. 2D *Release* §§ 46, 50-52 (1973).

and would not permit her to take care of the concern's books. The relationship continued to deteriorate, and when she returned in 1968 after a 9-month absence, her brothers physically ejected her from the business. The family dispute might explain the breakup of the business, but it did not affect Puzich's status as a partner. Rather, the court had to determine whether the Indiana Uniform Partnership Act⁵⁶ provisions for determining the existence of a partnership were satisfied by the undisputed and uncontroverted evidence.

The key provisions in issue were sections 23-4-1-6 and 23-4-1-7(4) of the Act. The former defines a partnership in terms of a business association of two or more persons "to carry on as co-owners a business for profit."⁵⁷ The latter provides that "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner . . .", but specifies five situations where the inference is improper, including where the profits are received in payment "as wages of an employee."⁵⁸ No doubt the Pappases argued that Puzich was an employee, but the court concluded that she was not within any of the exceptions to section 23-4-1-7(4) and thus had an interest in the business.

Actually, the partnership evidence was irrefutable. The net profits were returned to a common business account, from which the four drew equal salaries and from which they used funds to purchase their automobiles. The business's income taxes were paid from the account. The court noted that for 8 years Puzich was listed on federal partnership tax returns as a "partner" having a 25% share of the net business profits and devoting "100% of her time" to partnership business.⁵⁹ Needless to say, this was an admission against interest by the defendants, creating a presumption of partnership.⁶⁰ Furthermore, one of the brothers included

⁵⁶IND. CODE §§ 23-4-1-1 to -43 (Burns 1972).

⁵⁷*Id.* § 23-4-1-6. Crane and Bromberg extensively discuss the nature of the partnership. CRANE & BROMBERG §§ 4-14. See also 1 CAVITCH §§ 11.02, 12.01, 13.01; HENN §§ 19-20, 22.

⁵⁸IND. CODE § 23-4-1-7(4) (b) (Burns 1972). See generally 1 CAVITCH § 14.05; CRANE & BROMBERG §§ 14A to 20 (discussion of the presumptions and nonpresumptions). The intention of the parties is the key to the relationship, *Kamm & Schellinger Co. v. Likes*, 93 Ind. App. 598, 179 N.E. 23 (1931), and the substance, not the name, controls. *Watson v. Watson*, 231 Ind. 385, 108 N.E.2d 893 (1952).

⁵⁹314 N.E.2d at 797.

⁶⁰The court cited two non-Indiana decisions for the proposition. *Clauson v. Department of Fin.*, 377 Ill. 399, 36 N.E.2d 714 (1941); *In re Rosenberg's Will*, 208 App. Div. 707, 202 N.Y.S. 324 (1923). Although there do not appear to be any Indiana cases on point, federal tax returns are an accepted method of showing the co-ownership element of a partnership. CRANE & BROMBERG § 14, at 66. Interestingly, the *Puzich* court did not discuss whether she shared

her as a partner in a pleading and the other two admitted in an answer to an interrogatory that she was a "partner as to 25% of the profits."⁶¹ With these admissions it is somewhat surprising that the issue ever reached the appellate court or that the trial judge ruled against Puzich. Since the evidence and the reasonable inferences could lead only to a conclusion contrary to the ruling of the trial court, the court of appeals was justified in reversing.⁶²

D. Corporate Stock and Employment Relationships

*United States Controls Corp. v. Windle*⁶³ is a Seventh Circuit Court of Appeals decision with an Indiana connection. In *Windle* the court affirmed in part and vacated and remanded in part a decision of the United States District Court for the Northern District of Indiana in a diversity action brought by a corporation and its two majority shareholders for a judgment declaring there was no binding and enforceable contract to transfer one-third of the corporate shares to Windle and that Windle had no right to any stock. Windle counterclaimed, seeking damages, specific performance, and an accounting. The trial judge ruled for the plaintiffs on the stock issue, but held that Windle was entitled to recover \$26,009.25 as reasonable compensation for his services. On appeal the court upheld the first point as not clearly erroneous, but concluded that Windle's award should be doubled since he had secured the corporation's two main customers. Under a *quantum meruit* theory of recovery, the judgment was the obligation of the corporation.

The suit's genesis was in 1968 when one plaintiff approached Windle and the other plaintiff about the possibility of forming a new business to manufacture electric controls. Windle at the time was a salesman for a company which produced such controls. He was responsible for introducing the plaintiffs to a buyer for the Whirlpool Corporation. Efforts to interest Whirlpool in a pro-

control of the enterprise with her brothers. Joint control is as integral to co-ownership as is profit sharing. 1 CAVITCH § 14.05[2]; CRANE & BROMBERG § 14, at 69-72, § 65.

⁶¹314 N.E.2d at 797. The sharing of profits is the primary attribute of partnership, and while it is not the only one, it is the only one singled out for a statutory presumption under the Indiana Uniform Partnership Act. IND. CODE § 23-4-1-7(4) (Burns 1972). See 1 CAVITCH § 14.05; CRANE & BROMBERG § 14.

⁶²The court of appeals recognized the burden an appellant must sustain before a trial court will be reversed, citing *Gariup v. Stern*, 254 Ind. 563, 261 N.E.2d 578 (1970), and *Sekerez v. Gary Redev. Comm'n*, 301 N.E.2d 372 (Ind. Ct. App. 1973), but concluded that the burden was met. See also note 44 *supra*.

⁶³509 F.2d 909 (7th Cir. 1975) (Hastings, J.).

posed buzzer came to naught, but eventually Whirlpool invited the plaintiffs to design a special relay. At times Windle sat in on the Whirlpool negotiations. Eventually an order for the relays was placed with U.S. Controls Corporation, which had not yet been formed. It was subsequently incorporated by the plaintiffs, who each received 4,300 of the authorized common shares. A third shareholder, who eventually became a director, received 200 shares. Initially Windle was asked to be a director, but the offer was withdrawn, and he was not informed of the incorporation or the issuance of the stock. Shortly after the company started production, Windle demanded one-third of the stock. His demand was refused. He then was offered compensation for his services, which he declined. The litigation followed.

The Seventh Circuit, rather summarily, adversely decided Windle's contention that he was entitled to one-third of the shares. Judge Hastings, for the court, reviewed the record and concluded that the lower court's finding that the evidence failed to establish "even by implication, an agreement between the parties"⁶⁴ was not clearly erroneous.⁶⁵ Consequently, there was no reason to consider whether the agreement fell within the Statute of Frauds.

There was no doubt that Windle was entitled to some compensation. The absence of an enforceable contract did not defeat his right to recover the reasonable value of his services under a *quantum meruit* theory.⁶⁶ The court noted that the company's principal customers had been contacted by Windle and that the services were rendered with a reasonable expectation of payment. Thus, the Seventh Circuit agreed with the district court's finding that this was a "proper case for equitable relief in order to prevent the manifest unjust enrichment of plaintiffs at the expense of Windle."⁶⁷

⁶⁴*Id.* at 911.

⁶⁵Rule 52(a) of the Federal Rules of Civil Procedure establishes the clearly erroneous test which has its genesis in the former federal equity practice and the seventh amendment with respect to common law jury trials. For a general discussion of the rule and its impact on the review process see 5A J. MOORE, FEDERAL PRACTICE ¶¶ 52.01-10 (2d ed. 1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2571-91 (1971). See also 3 W. HARVEY, INDIANA PRACTICE 420-30 (1970).

⁶⁶The court cited *Goldberg v. Liston*, 431 F.2d 1101, 1103 (7th Cir. 1970), involving former world heavyweight boxing champion, Sonny Liston, as recognizing the principle of *quantum meruit*, although in that case the plaintiff's claim had been satisfied. For a discussion of this doctrine see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 9-10, 238, 241 (1970); 1 A. CORBIN, CORBIN ON CONTRACTS § 20 (1963); 5 *id.* §§ 1102, 1104, 1109 (1964); A. CORBIN, CORBIN ON CONTRACTS § 20 (one vol. ed. 1952); 66 AM. JUR. 2D *Restitution and Implied Contracts* §§ 1-7 (1973); 58 AM. JUR. *Work and Labor* §§ 3-4, 6, 10 (1948).

⁶⁷509 F.2d at 912.

However, the court was not willing to grant Windle the compensation he wished—one-third of the stock. The trial court had decided on a commission of 2.5 percent of the net sales of over \$1 million, but the Seventh Circuit rejected this amount as inadequate. Since commissions in the Milwaukee area in the appliance control field averaged 5 percent, the court concluded that this was an appropriate rate to be paid by the corporation. The court accepted the two years prior to June 30, 1971, as the compensation period, but it might have "fudged" on the rate to get Windle a fairer deal, since it noted the corporation had subsequent sales of over \$2,500,000.

Interestingly, Controls argued that Windle was precluded from any compensation because he breached his duty to his employer by not relaying to it the Whirlpool sales opportunity. The court did not respond to this argument other than to note that the trial court had found that Windle's employer was not engaged in manufacturing similar devices and that Windle continued to work for his employer and a successor. The Seventh Circuit seems wrong in concluding that the fact the employer was not producing similar devices absolved Windle. An agent's duty of loyalty to a principal very likely precludes conduct like Windle's,⁶⁸ but the point would more appropriately be raised by Windle's employer than by Controls, which was attempting to avoid an obligation. Perhaps the court's comment that Windle continued to be employed is simply a shorthand indication that the employer was not objecting to Windle's moonlighting activities.

E. Appointment of Receiver

The propriety of a Marion County Superior Court interlocutory order appointing a receiver without notice was the issue in the per curiam decision of the Second District Court of Appeals in *Environmental Control Systems, Inc. v. Allison*.⁶⁹ The court of appeals reversed because plaintiffs had not complied with the sta-

⁶⁸See *Cavanaugh Nailing Mach. Co. v. Cavanaugh*, 167 Cal. App. 2d 657, 334 P.2d 954 (1959); *Bockemuhl v. Jordan*, 270 Wis. 14, 70 N.W.2d 26 (1955). See generally RESTATEMENT (SECOND) OF AGENCY §§ 383-394 (1958); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 147-49, 151 (1954); Comment, *The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339 (1962).

⁶⁹314 N.E.2d 820 (Ind. Ct. App. 1974). Appellees might have had some doubts about their prospects on appeal since no brief was filed. Consequently, a prima facie demonstration of error would mandate a reversal. *Bill v. Bill*, 290 N.E.2d 749 (Ind. Ct. App. 1972); *Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

tutory requirement that excuses notice of an application for a receiver "only upon sufficient cause shown by affidavit."⁷⁰

The purported verification of the allegations of the complaint were made "upon belief," and the court, citing *Henderson v. Reynolds*⁷¹ as authority, held that such a complaint is inadequate. In *Henderson*, which also involved an appeal from an interlocutory order, the court held that verifications that statements were true to the best of the "knowledge" or "information and belief" of the pleader are legally insufficient and not admissible in evidence at a hearing on the application for a receiver. In other words, to be admissible, such allegations must be verified in positive terms. The use of a complaint rather than a separate affidavit in *Allison* was not improper, since such a procedure was approved in *Second Real Estate Investments, Inc. v. Johann*.⁷² The *Johann* court commented that the statutory requirement implied a written affidavit or verified complaint filed as the cause of the receiver's appointment. Otherwise "the adverse party may [not] know the exact facts on which the judge acted in appointing a receiver in his absence and wresting from him the control of his property without a hearing or an opportunity for such hearing."⁷³ This attitude is consistent with cases holding *ex parte* proceedings in disfavor and emphasizing that they should be avoided wherever possible. To justify such an appointment "[t]here must exist a pressing emergency which shows that waste, loss or destruction of property will probably occur before reasonable notice can be given and the parties heard and the lack of any other available remedy before a court may appoint a receiver on an *ex parte* hearing."⁷⁴

Since the complaint and affidavit are all a court has before it in appointing a receiver without notice, it is of utmost importance that they conform to the statutory requirements. As *Allison*

⁷⁰IND. CODE § 34-1-12-9 (Burns 1973). For a general discussion on appointing receivers without notice see 1 R. CLARK, RECEIVERS § 82 (3d ed. 1959). Clark specifically discusses the Indiana statute. *Id.* § 82(e).

⁷¹168 Ind. 522, 523-26, 81 N.E. 494, 495-96 (1907).

⁷²232 Ind. 24, 111 N.E.2d 467 (1953).

⁷³*Id.* at 30, 111 N.E.2d at 470.

⁷⁴*Fagan v. Clark*, 238 Ind. 22, 26, 148 N.E.2d 407, 409 (1958). The *Fagan* court noted that bonds afford some protection against improvident injunctive relief but that the statute, IND. CODE § 34-1-12-9 (Burns 1973), does not require a bond. However, the supreme court in *State ex rel. Nineteenth Hole, Inc. v. Marion Superior Court*, 243 Ind. 604, 189 N.E.2d 421 (1963), held that the court's equity jurisdiction authorized it to require an indemnifying bond. See note 70 *supra*. See also 65 AM. JUR. 2D *Receivers* §§ 97-98, 105 (1973). A defendant who obtains an appeal bond is entitled to have the appointment suspended during the appeal. IND. CODE § 34-1-12-10 (Burns 1973); 65 AM. JUR. 2D *Receivers* § 106 (1973). The *Allison* court apparently had ordered a bond. 314 N.E.2d at 823.

points out, the Indiana Supreme Court has, on numerous occasions, discussed what must be shown to justify the *ex parte* proceedings. *Johann & Sons v. Berges*⁷⁵ requires a showing, by affidavit or verified complaint, that plaintiff's rights can only be protected by extraordinary relief and that waste or loss is threatened and would occur if there was delay until notice could be given. *Indianapolis Machinery Co. v. Curd*⁷⁶ emphasized the need to show by specific facts an immediate threat to corporate assets and further opined that a conclusion a defendant might abscond with assets is insufficient. A "belief" will not suffice. The even more recent decision in *Inner-City Contractors Service, Inc. v. Jolley*,⁷⁷ reiterating the language of the earlier cases, made it clear that lower courts should act with the utmost circumspection.

In applying these rules, the *Allison* court concluded the complaint was deficient particularly because the allegations were mere conclusional statements, some only hearsay supported by plaintiffs' belief. In fact it was so deficient that it alleged "facts" that had not occurred. Such clairvoyance, as the court stated, could at best mean that plaintiffs felt "defendants might in the future dissipate or encumber corporate assets"⁷⁸ to their detriment and under *Indianapolis Machinery Co.*, "[t]he mere possibility or potentiality of doing injury or violating the law cannot be made the basis alone for equitable interference by a court."⁷⁹

F. Securities Law Exemptions

Indiana Securities Law⁸⁰ exemptions were in issue in *Worsley v. State*,⁸¹ where the First District Court of Appeals affirmed Worsley's conviction in a jury trial in the Hamilton County Superior Court. Worsley had been charged with six counts of violating the statute: (1) Offering for sale unregistered securities; (2) selling unregistered securities; (3) offering securities for sale while not registered as a broker, dealer or agent; (4) unlawfully selling securities; (5) making untrue statements of a material fact in connection with the offer of the sale of securities; and (6) making untrue statements of a material fact in connection with the sale of securities. Only two of the four issues raised on appeal are

⁷⁵238 Ind. 265, 150 N.E.2d 568 (1958).

⁷⁶247 Ind. 657, 221 N.E.2d 340 (1966).

⁷⁷257 Ind. 593, 277 N.E.2d 158 (1972). The *Jolley* case is discussed in Galanti, *Corporations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 77, 87-88 (1973).

⁷⁸314 N.E.2d at 824 (emphasis supplied by the court).

⁷⁹247 Ind. at 665, 221 N.E.2d at 345, quoted at 314 N.E.2d at 825.

⁸⁰IND. CODE §§ 23-2-1-1 to -25 (Burns 1972).

⁸¹317 N.E.2d 908 (Ind. Ct. App. 1974).

pertinent to this section: whether two of the counts were duplicitous, prejudicing his trial, and whether the conviction was contrary to law.⁸² The court disposed of Worsley's duplicity contention concerning counts 2 and 4 which is not surprising since the two counts alleged violations of different statutory provisions.⁸³ Although the court cited no authority, it is proper in Indiana to charge separate violations in separate counts of an indictment.⁸⁴ In fact joinder in one count might have been duplicitous.⁸⁵

The court also rejected Worsley's contention that the conviction was contrary to law because the state had failed to negate an exception to liability under counts 2 and 4 and had not proved he was a "broker, dealer or agent" under counts 1 and 2. The main issue was the exception contained in section 23-2-1-18(b) imposing criminal liability on persons who sell or offer to sell unregistered securities "except such securities as are exempt under Section 102(a) [subsection (a) of 23-2-1-2] or unless sold in any transaction exempt under Section 102(b) [subsection (b) of 23-2-1-2] of this Act"⁸⁶ The court, looking to section 23-2-1-16(j), which provides that the party claiming the benefits of an exemption or classification has the burden of proof,⁸⁷ found that Worsley clearly had failed to meet this burden. Worsley also argued that the evidence showed that he was an "issuer" of the stock rather than a broker-dealer or agent, and that the provisions underlying counts 1 and 2 applied only to agents or broker-dealers, not to issuers. The court simply noted the pertinent statutory definitions⁸⁸

⁸²The court also rejected Worsley's arguments that a state exhibit was improperly admitted into evidence and that his trial counsel was incompetent. 317 N.E.2d at 909-11.

⁸³Count 2 charged a violation of IND. CODE § 23-2-1-18(a) (Burns 1972), and Count 4 charged a violation of *id.* § 23-2-1-18(b).

⁸⁴*Albrecht v. United States*, 273 U.S. 1 (1926); *Lawson v. State*, 202 Ind. 583, 177 N.E. 266 (1931); *Campbell v. State*, 197 Ind. 112, 149 N.E. 903 (1925).

⁸⁵*Ault v. State*, 249 Ind. 545, 233 N.E.2d 480 (1968); *Glazer v. State*, 204 Ind. 59, 183 N.E. 33 (1932); *cf. State v. Schell*, 248 Ind. 183, 224 N.E.2d 49 (1967).

⁸⁶IND. CODE § 23-2-1-18(b) (Burns 1972). For a general discussion of Indiana Securities Law exemptions see Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 285-94 (1969). See generally 14 FLETCHER § 6754.

⁸⁷IND. CODE § 23-2-1-16(j) (Burns 1972). See *Hippensteel v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, *Business Associations, 1974 Survey of Indiana Law*, 8 IND. L. REV. 24, 29-35 (1974).

⁸⁸IND. CODE §§ 23-2-1-1(b) (agent), -1(f) (issuer) (Burns 1972). Although an individual can be an issuer under certain circumstances, the Act clearly contemplates that an issuer will be a business entity. The definition is similar to that found in the Federal Securities Act of 1933, 15 U.S.C. § 77b(4) (1970), although someone in Worsley's position might be an "under-

and did not really discuss the nature of "issuers" or "agents" under the statute. Rather, it took refuge in the proposition that the jury's finding him an agent selling the stock of an Indiana corporation had support in the record.⁸⁹

G. Statutory Developments

The 1975 first regular session of the 99th Indiana General Assembly adopted several significant amendments to the Indiana Code relating to corporate affairs. The two most significant are a new Business Takeover Law and amendments to the Indiana Securities Law.⁹⁰

1. Business Takeover Law

The most significant legislative development in the corporate area during this survey period was the adoption of a Business Takeover Law.⁹¹ The new law puts Indiana in the forefront of those states⁹² recognizing the problems created by the current phenome-

writer" or a "control person" under the 1933 Act with greater statutory responsibilities. See generally 1 L. LOSS, SECURITIES REGULATION (2d ed. 1961, Supp. 1969) c. 3A.

⁸⁹See *In re Estate of Barnett*, 307 N.E.2d 490 (Ind. Ct. App. 1974); *Lindenberg v. M & L Builders & Brokers, Inc.*, 302 N.E.2d 816 (Ind. Ct. App. 1973); IND. R. APP. P. 15(M); cf. IND. CODE § 35-1-47-9 (Burns 1975). See also notes 44 & 62 *supra*.

⁹⁰Other enactments that deserve noting are: Ind. Pub. L. No. 44 (Apr. 29, 1975), amending scattered sections of IND. CODE tits. 5, 27 & 28 (codified in scattered sections of *id.* (Burns Supp. 1975)) (relating to investments in certain federal obligations); Ind. Pub. L. No. 252 (Apr. 21, 1975), amending IND. CODE § 22-4-10-6 (Burns 1974) (codified at *id.* (Burns Supp. 1975)) (relating to unemployment compensation contributions of successor employers); Ind. Pub. L. No. 262 (Apr. 30, 1975) (codified at IND. CODE §§ 23-2-2.5-1 to -50 (Burns Supp. 1975)) (authorizing the securities commissioner to regulate franchises. See discussion in *Contracts infra*); Ind. Pub. L. No. 286 (Apr. 29, 1975), amending IND. CODE §§ 28-1-21-2, -10, -22 to -26 (Burns 1973) (codified at *id.* §§ 28-1-21-1 to -45 (Burns Supp. 1975)) (permitting building and loan associations to serve as trustees under Federal IRA accounts and broadening the lending authority of such associations).

⁹¹Ind. Pub. L. No. 263 (Apr. 29, 1975) (codified at IND. CODE §§ 23-2-3-1 to -12 (Burns Supp. 1975)). The Act was deemed an emergency measure and became effective on May 1, 1975. The author wishes to acknowledge the helpful comments about this Act made by Gregory D. Buckley, Esq., at an Update Seminar on Indiana Securities Laws sponsored by the Indiana Continuing Legal Education Forum on June 13, 1975, and the helpful comments on the new amendments to the Indiana Securities Law made by Stephen W. Sutherlin, Indiana securities commissioner, at the same seminar. See text accompanying note 117 *infra*.

⁹²MINN. STAT. ANN. §§ 80B.01-.13 (Cum. Supp. 1974); NEV. REV. STAT. §§ 78.376-.3778 (1973); OHIO REV. CODE ANN. § 1707.04.1 (Page Supp. 1974); VA. CODE ANN. §§ 13.1-528 to -540 (Repl. Vol. 1973); WIS. STAT. ANN.

non of business takeovers and attempting to regulate the process without a flat prohibition. The phenomenon is of particular concern at present because even with the spring-1975 market rebound, prices of equity securities of many publicly traded corporations are still relatively depressed. Thus, an offeror can take over valuable business enterprises at prices not related to value—perhaps for beneficial or perhaps for “raiding” purposes. Furthermore, many money markets are flush with cash, often petrodollars, which opens up American industry to foreign control. Maybe we would be getting our “just desserts,” but that does not negate the threat.⁹³ Of course, while managements of target companies tend to view askance any takeover attempt, it must be recognized that they do serve a valid corporate purpose.⁹⁴

Corporate takeovers are regulated in various degrees under federal and state securities statutes. However, many have felt that existing regulation is inadequate and that the area is an appropriate one for state involvement. The principal federal statute involving takeovers is the Williams Act,⁹⁵ which added section

§§ 552.01-.25 (Spec. Pamphlet 1975). For a discussion of state regulation of takeovers see Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. REV. 767 (1971); Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis*, 21 CASE W. RES. L. REV. 613 (1970); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970); Sommer, *The Ohio Takeover Act: What is It?*, 21 CASE W. RES. L. REV. 681 (1970); Note, *Take-over Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969). The *sine qua non* for persons interested in the takeover phenomenon and the responses of courts and legislatures is E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* (1973). See also Robinson, Book Review, 47 S. CAL. L. REV. 1647 (1973).

⁹³Robinson, *supra* note 92, at 1653, points out the increase in international tender offers in recent year and quotes from an article in *The Economist*, July 14-20, 1973, at 70, suggesting that European interests take advantage of the depressed market to “buy American.” Indiana has first hand experience of the threat. In 1974 the Magnavox Corporation of Fort Wayne and the Bio-Dynamics Corporation of Indiana were taken over by foreign interests. See *Wall Street Journal*, Feb. 25, 1975, at 4, col. 2 (Bio-Dynamics); *id.*, May 1, 1975, at 3, col. 4 (Magnavox).

⁹⁴A common theme of those critical of efforts to regulate and restrict takeovers is that it entrenches “dead wood” management. See, e.g., Brudnev, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609 (1967); Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Sommer, *supra* note 92. See also *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967).

⁹⁵15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1970). The literature on the Williams Act is legion. For a sampling see the articles listed in R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 940 (3d ed. 1972). Of course other SEC rules and regulations, such as rules 10b-5 and 10b-13, 17 C.F.R. § 240.10b-5,

13(d) and (e) and 14(d), (e) and (f) to the Securities Exchange Act of 1934. One of the problems with the Williams Act is that it does not require notice to the target company of a proposed tender until the required disclosure information is filed with the Securities and Exchange Commission (SEC) coincidental with making the tender.⁹⁶ This makes it difficult for management to work out a better deal. Also, the amount of information of the offeror reaching the offeree under implementing SEC rules⁹⁷ to the Williams Act might not be enough to allow the offeree to make a sound decision. Without complete disclosure, shareholders who are receptive to a tender might not know if the price adequately reflects the value of the corporation. This is true even under the best of market conditions, and even more so with takeovers of undervalued stock. Even if the tender price exceeds the current market price, shareholders might still suffer a loss. If they are not receptive, they might not know their prospects as minority shareholders, which can include being merged out at unfavorable terms.⁹⁸ Also, one does not have to be a xenophobe to fear that foreign interests might be after quick profits, perhaps from a liquidation of assets, without regard to the American economy, society, or labor force that sees jobs evaporating.

Clearly a state has an interest in business takeovers. The Indiana legislature's response to this interest was the Business Takeover Law⁹⁹ which provides the following: (1) A notice period to the target company; (2) a full disclosure statement that must be filed with the Indiana Securities Commissioner; and (3) the opportunity for the target company to request a hearing before the commissioner, or on the commissioner's own volition, to determine the fairness of the disclosure materials and even the terms of the offer. Because of space limitations only the highlights of the Act can be noted here. Section 1 is a definitional section, but as is common in this type of legislation, it is jurisdictional in character since it determines which tender offers are within and which are without the Act. A key feature of the section is that it defines "affiliates,"

.10b-13 (1975), apply as well. *See Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969).

⁹⁶15 U.S.C. § 78m(d) (1970).

⁹⁷*See* SEC Rules 13d-1, 14d-1, 17 C.F.R. §§ 240.13d-1, .14d-1 (1975). *See also* *Corenco Corp. v. Schiavone & Sons*, 362 F. Supp. 939 (S.D.N.Y. 1973).

⁹⁸*See, e.g., Green v. Sante Fe Indus., Inc.*, 391 F. Supp. 849 (S.D.N.Y. 1975); *David J. Green & Co. v. Schenley Indus., Inc.*, 281 A.2d 30 (Del. Ch. 1971). *See also* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964).

⁹⁹IND. CODE §§ 23-2-3-1 to -12 (Burns Supp. 1975). Citations to particular sections will be omitted, unless otherwise appropriate.

“associates,” and “control” in a manner that keeps offerors from avoiding the impact by the Act by utilizing different corporate entities. The section broadly defines “equity security” as securities possessing the right to vote on corporate matters at the time of the offer. The General Assembly appears to have encompassed all securities, including convertible securities, that influence control of the business enterprise. Thus, the Act is not limited to corporate common stock. “Target company” is defined as a “corporation or other issuer of securities,” which would seem to include enterprises such as limited partnerships. An enterprise must be publicly held to be within the Act. Subsection 1(i) defines a “takeover offer”¹⁰⁰ as an offer to acquire the equity securities of a target company where, after the acquisition, the offeror would be directly or indirectly a record or beneficial owner of more than 10 percent of any class of outstanding equity security. The section specifically excludes tenders “made to the owners of equity securities of a target company with less than one hundred (100) owners of record at the time of the offer.”

Subsection 1(i) contains further exclusions. Ordinary brokerage transactions are excluded, as are de minimis offers to 2 percent of the class within the preceeding 12-month period. Offers by a company for its own securities are excluded; therefore, tenders to increase a supply of treasury shares for corporate purposes, a stock option for example, are outside the scope of the Act. This exemption might be a legislative error considering the even newer phenomenon of publicly held corporations “going private” a few years after going public.¹⁰¹ Shareholders of these corporations are entitled to as much protection, if not more, as are the shareholders of other target companies. Subsection 1(i)(5) excludes offers initiated or approved by the board of directors of the target company. Normally the problem tender offers are the unfriendly ones, but it is not inconceivable that shareholders might be jeopardized where management might be “selling out” the shareholders.¹⁰² The

¹⁰⁰*Id.* § 23-2-3-1(i). Interestingly, neither the Securities Exchange Act itself nor the Williams Act amendments define tender offer or takeover offer in so many words. However, the meaning of the term is becoming well established under federal law. See Note, *The Developing Meaning of “Tender Offer” Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

¹⁰¹There was considerable furor over this practice in the fall of 1974 when A. A. Sommer, Jr., an SEC Commissioner, attacked the practice in a speech given at the Law Advisory Council lecture of Notre Dame Law School on November 14, 1974. See *Wall Street Journal*, Nov. 15, 1974, at 8, col. 2; *id.*, Nov. 21, 1974, at 13, col. 3. Shareholder attacks on the practice have been unsuccessful so far, see *Kaufman v. Lawrence*, 386 F. Supp. 12 (S.D.N.Y. 1974), but the SEC is investigating the matter.

¹⁰²A shareholder derivative suit would afford some protection, see, e.g., *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952

section raises questions as to what happens when a hostile tender offer is subsequently approved by the board. It would seem that the subsequent approval of the offer would moot the issue. Lastly, the commissioner, who is charged with administering the Act, can determine by ruling that a takeover attempt is not aimed at corporate control and exempt it from the Act.

One of the most intriguing provisions is subsection 1(j), which defines "target company" as an enterprise organized under the laws of Indiana or where its "principal place of business or a substantial portion of its assets" are in this state. Thus, the Act applies to corporations that are primarily Indiana enterprises but which happen to be organized in another state, such as Delaware. This is not out of the ordinary, but the final phrase encompassing companies with substantial assets in Indiana is somewhat extraordinary in that it might include companies such as General Motors and U.S. Steel. However, "substantial" is a broad and somewhat ambiguous term, and the commissioner or the courts could determine that a tender offer for General Motors, as unlikely as that may be in the current climate in the automobile industry, is not subject to the Act.¹⁰³ Of course this problem pales when it is realized that the Act seems to have worldwide application, that is, a Saudi Arabian tendering for English-owned shares would have to comply. This last possibility seems to raise constitutional questions.¹⁰⁴

The other key provision is section 2, which allows takeovers only if effective under the Act, or exempted by regulation or order of the commissioner. Before an offer can become effective, a disclosure statement similar to an Indiana Securities Law registration statement must be filed with the commissioner.¹⁰⁵ Subsection 2(c) specifies in detail the information that must be disclosed. The information includes all the items and matters that a security holder, the target company, or the commissioner would find ma-

(1955); *Barr v. Wackman*, 329 N.E.2d 180 (N.Y. 1975), but the procedural hurdles discount such suits as an effective remedy. See generally 13 FLETCHER §§ 5961-71.10; HENN §§ 368-71; LATTIN §§ 102-16.

¹⁰³This aspect of the comparable Ohio provision, OHIO REV. CODE ANN. 1707.041(a) (1) (Page 1974), is discussed in Sommer, *supra* note 92, at 689, and Shipman, *supra* note 92, at 751-55.

¹⁰⁴Shipman, *supra* note 92, at 740-50, also considers this issue and concludes that the Act is constitutional. It does not appear to have been tested in the courts.

¹⁰⁵Compare IND. CODE § 23-2-1-5 (Burns 1972) (Securities Law), with *id.* §§ 23-2-3-2(b)-(c) (Burns Supp. 1975) (Business Takeover Law). Interestingly, section 23-2-3-2(b) requires that an Indiana licensed attorney file the disclosure statement. Although it will not make Indiana securities practitioners unhappy, the ostensible reason is to give the commissioner a responsible person in Indiana to deal with when considering and reviewing the statement.

terial. This statement must be sent to the target company and must be publicly disclosed¹⁰⁶ no later than the date of filing with the commissioner. Under Subsection 2(d) the commissioner can request additional information or permit the omission of insignificant information.

Under Subsection 2(e) an offer automatically becomes effective 20 days after it is filed unless the target company requests a hearing before the commissioner, or the commissioner orders one, to determine if the proposed tender offer is fair, just, and equitable to the security holders. If the target company agrees, the effective date can be accelerated, not unlike the process for the effectiveness of registration statements under the Indiana Securities Law.¹⁰⁷ Subsection 2(f) authorizes the commissioner to deny the effectiveness of the offer or require changes if it fails to provide full and fair disclosure of all material information concerning the offer or if the takeover is unfair or inequitable to the offerees.¹⁰⁸ This section also provides that an order making an offer effective does not constitute an approval of the takeover, and thus does not insulate the offeror against later charges of fraud. Section 4 makes it unlawful for any person to engage in "fraudulent, deceptive, or manipulative acts or practices" in connection with a takeover offer and specifically includes certain acts such as "gun-jumping," use of false or misleading information, sales by target company insiders at prices higher than paid to offerees unless made at the existing market price,¹⁰⁹ and acquisition of shares other than pursuant to the tender after it is announced.

The Act does not apply only to the tender offeror. In addition to section 4, section 3 requires that materials sent to the shareholders by either the offeror or the target company must be filed with the commissioner three full business days before they are used. This gives the commissioner the opportunity to review the materials and eliminate anything misleading or erroneous. Subsection 3(b) complements section 4 by prohibiting filings that

¹⁰⁶The intent of the public announcement requirement no doubt is to prevent persons with advance knowledge of the takeover from taking advantage of that knowledge in the securities market.

¹⁰⁷Compare IND. CODE § 23-2-1-5(c) (Burns 1972) (Securities Law), with *id.* § 23-2-3-2(e) (Burns Supp. 1975) (Business Takeover Law).

¹⁰⁸There are some possible problems with this procedure, but the drafters seem to have avoided some of the problems of the Ohio statute. See Sommer, *supra* note 92, at 697-703.

¹⁰⁹It is not absolutely clear what would happen under the Act if the sale by insiders to the offeror at inflated prices occurred before the takeover offer was formalized and the board of the target company approved. Cf. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

contain false or misleading information, thus paralleling federal provisions in this area.¹¹⁰

The Act contains other substantive provisions. Subsection 5(a) allows offerees to withdraw securities up to three days before the offer expires. Subsection 5(b) requires pro rata treatment of tenders if more than the requested number of shares are tendered. This means equal treatment of offerees, but it can result in all offerees ending up as minority shareholders if less than all of their shares are accepted. The arbitrageurs, however, will reduce this possibility.¹¹¹ Subsection 5(c) is a most-favored-nation clause, requiring that persons who are tendering be paid any subsequent increase in tender price. Subsection 5(d) prohibits offers by offerors who are involved in actions by the commissioner. Subsection 5(e) closes a potential loophole by precluding offerors from making a tender to all shareholders other than Indiana residents.

Section 6 authorizes the commissioner to administer the Act and to promulgate necessary regulations. Section 7 sets a \$750 fee for filing the disclosure statement and for a target company's request for a hearing. Although the fees seem high on their face, they are reasonable considering the amount of time and effort that will be spent in considering tender offers. Subsection 8(a) grants the commissioner injunctive powers and the right to obtain relief similar to the powers granted under the Indiana Securities Law.¹¹² Subsection 8(b) empowers the target company, the offeror, or any offeree to bring suit to enjoin violations of the Act or to enforce compliance.¹¹³

Sections 9 and 10 of the Act are the criminal and civil liability sections. Section 9 makes misdemeanors of the failure to file a disclosure statement and of miscellaneous other violations, but publishing false material or intentionally omitting or withholding

¹¹⁰Although it is somewhat out of date because of the explosive developments in the securities area in the past 15 years, L. LOSS, *SECURITIES REGULATION* (2d ed. 1961) and the 1969 Supplement is still an outstanding reference work on the sources and development of federal regulation of securities transactions. See also A. BROMBERG, *SECURITIES LAWS: FRAUD—SEC RULE 10b-5* (1969).

¹¹¹For a discussion of the role and function of these somewhat arcane individuals see Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. PA. L. REV. 466 (1971).

¹¹²Compare IND. CODE § 23-2-1-17.1 (Burns 1972) (Indiana Securities Law), with *id.* § 23-2-3-8 (Burns Supp. 1975) (Business Takeover Law). The reference to the Securities Law provision is to the new language added by IND. CODE §§ 23-2-1-1 to -20 (Burns Supp. 1975). See pp. 59-63 *infra*.

¹¹³Professor Shipman posited that one of the defects in the Ohio Act was that the target company and offerees might not have standing to seek an injunction against a blatantly improper tender offer. Shipman, *supra* note 92, at 739.

material information is a felony. Subsections 10(a) and (b) are civil liability provisions, authorizing rescission or damages to persons who tendered securities and damages for those who did not because of improper statements or misleading information. Subsection 10(c) extends liability to those indirectly involved unless they are not and could not be aware of the facts creating the liability. Subsection 10(d) is a three year statute of limitations,¹¹⁴ and subsection 10(e) makes the rights and remedies cumulative. Section 11 provides for a trial de novo from any final order of the commissioner, which is similar to the judicial review provision of the Indiana Securities Law.¹¹⁵ It also means that a target company can delay a tender offer almost indefinitely. Even without an appeal it can take up to 100 days for an offer to become effective. This gives a target company time to work out better terms or to arrange a defensive merger with another, perhaps more compatible, company. Finally, section 12 excludes tenders for target companies regulated by other statutes, such as insurance companies and utilities.¹¹⁶

2. Securities Law Amendments

Also of significance were several major amendments to the Indiana Securities Law.¹¹⁷ Perhaps the most significant amendment is the new private offering exemption provided by amended subsection 23-2-1-2(b) (10). Previously the exemption was contingent on not offering the securities to more than 20 persons within a 12-month period. The provision now tracks SEC Rule 146.¹¹⁸ It

¹¹⁴Although the period is the same as in the newly amended securities law section, the provisions in the two laws are not cast in exactly the same terms. Compare IND. CODE § 23-2-1-19(e) (Burns Supp. 1975) (Indiana Securities Law), with *id.* § 23-2-3-10(d) (Burns Supp. 1975) (Business Takeover Law).

¹¹⁵Compare IND. CODE § 23-2-1-20 (Burns 1972) (Securities Law), with *id.* § 23-2-3-11 (Burns Supp. 1975) (Business Takeover Law).

¹¹⁶The rationale no doubt was based on the assumption that those target companies could be best protected by the agencies charged with their regulation. This is a broader exemption than provided in the Ohio Act. See Shipman, *supra*, note 92, at 728-29.

¹¹⁷Ind. Pub. L. No. 261 (Apr. 30, 1975) (codified at IND. CODE §§ 23-2-1-1 to -20 (Burns Supp. 1975), amending IND. CODE §§ 23-2-1-1 to -25 (Burns 1972). The Act was deemed an emergency measure, and became effective on May 1, 1975. As with the Business Takeover Law, statutory citations will be omitted unless otherwise required.

¹¹⁸17 C.F.R. § 230.146 (1975). For a general discussion of private placements under the 1933 Securities Act and rule 146 see Borton & Rifkind, *Private Placement and Proposed Rule 146*, 25 HASTINGS L.J. 287 (1974); Note, *Maryland Blue Sky Reform: One State's Experiment with the Private Offering Exemption*, 32 MD. L. REV. 273 (1972); Note, *Revising the Private Placement Exemption*, 82 YALE L.J. 1512 (1973).

exempts offers or sales of securities by the issuer if certain conditions are met. The most significant conditions are the following: (1) There are more than 35 purchasers of the securities in any private offering excluding purchasers in exempt transactions or purchasers of registered securities; (2) the securities are not offered or sold through general advertisements or solicitations; (3) the purchasers give "investment letters" representing that the securities are being acquired for investment purposes only; and (4) no commission or remuneration is paid with respect to the transactions unless the offerees are furnished with an offering statement setting forth material facts and the commissioner is notified in writing of the terms of the offer and does not disallow the exemption. An apparent oversight in this provision is that the exemption is available only to issuers and not also to persons reselling such securities. Thus, the exemption is narrower than SEC Rule 146. Persons acquiring shares in exempt private placements will have to find other exemptions before they can be resold. Otherwise, the shares will have to be registered.¹¹⁹ The most likely exemptions would be those that involve the isolated nonissuer sale or the nonissuer sale pursuant to an unsolicited offer to buy.¹²⁰ However, these exemptions, at least with respect to the number of persons, are not as broad as the exemption available to issuers.

One important definitional change was the deletion of the "intentional" and "gross negligence" elements in Indiana Code subsection 23-2-1-1(d), defining fraud and deceit. This raises the standards the statute imposes on persons dealing in securities by making even negligent misrepresentations actionable.¹²¹ The amended language further provides that the courts are not limited to common law deceit¹²² when applying the phrase "fraud and deceit."

Another important definitional change was the addition of new language to subsection 23-2-1-1(i), and conforming amendments to other relevant provisions, to include "purchases" as a security transaction. A purchaser obviously does not have to comply with as many statutory provisions as a seller or issuer, but a purchaser committing a fraud is now subject to the sanctions of

¹¹⁹See IND. CODE §§ 23-2-1-4 to -7 (Burns 1972).

¹²⁰See *id.* §§ 23-2-1-2(b) (1), (2).

¹²¹This brings the statute more closely in line with the sections 101 and 410 of the Uniform Securities Act which relate to fraudulent transactions. See generally 14 FLETCHER § 6759; 3 L. LOSS, SECURITIES REGULATION 1631-52 (Supp. to 2d ed. 1969).

¹²²This language also parallels that in section 401(d) of the Uniform Securities Act. See authorities cited note 121 *supra*.

the securities law.¹²³ Subsection 23-2-1-1(k) was amended by making securities of "commodity futures contracts" and options for such contracts. Apparently, concern over the somewhat unregulated commodities market prompted the move to give the commissioner regulatory authority.¹²⁴

Another area where regulation was deemed inadequate was remedied by a complete revision of subsection 23-2-1-1(n) which now defines "investment advisers" as persons who, for compensation, either inform others, directly or through publications, of the value of securities or of the advisability of investing or who analyze or report on securities as a regular business activity. Because such a broad definition could encompass persons not normally considered to be in the securities business, the provision specifically excludes the following: Banks and other financial institutions; lawyers, accountants, and other professionals acting in a professional capacity; broker-dealers advising solely incidentally to their brokerage business; publishers of bona fide newspapers, or business or financial publications of general circulation; persons advising on exempt securities; persons advising other investment advisers, pension trusts, and other institutions deemed to possess adequate knowledge and skill to protect their own interests; and such other persons as the commissioner may exempt. Under amended section 23-2-1-8, investment advisors must register with the commissioner; section 23-2-1-9 sets forth what must be disclosed in a registration application. Sections 23-2-1-10 and 23-2-1-11, relating to record keeping and regulations, were amended to conform to the other changes. Section 23-2-1-12.1 was added. The section makes it unlawful for investment advisors to engage in fraudulent practices and specifically outlaws certain types of investment advisory contracts. Practitioners can expect the commissioner to use the rulemaking provisions to promulgate specific regulations for investment advisors.¹²⁵

A new subsection, 23-2-1-1(o), was added defining "transferable shares" as securities representing equity interests in corporations or business trusts but excluding open-end investment compan-

¹²³The fraud provision of the Uniform Securities Act, section 101, also applies to purchasers, which is not surprising considering it is based on the ubiquitous rule 10b-5, 17 C.F.R. § 240.10b-5 (1975).

¹²⁴Federal regulation of these activities was recently expanded with the enactment of the Commodity Futures Trading Commission Act of 1974, 7 U.S.C.A. §§ 4a *et seq.* (Supp. 1, 1975).

¹²⁵The SEC also regulates investment advisors under the authority of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (1970). See generally Note, *The Investment Advisors Act and the Supreme Court's Interpretation of Its Antifraud Provisions*, 37 S. CAL. L. REV. 359 (1964), reprinted in 7 CORP. PRAC. COMMENTATOR 58 (1965-66).

ies as defined by the Investment Company Act of 1940.¹²⁶ Subsection (p) was added defining a "qualified transfer agent" as Federal Deposit Insurance Corporation-insured banks or persons independent of the issuer approved by the commissioner. This complements new subsection 23-2-1-6(k) denying exemptions to transferable shares unless the issuer has designated a qualified transfer agent. The sections relating to "independent transfer agents" were repealed.¹²⁷

The new amendments also changed subsection 23-2-1-2(a) by adding "industrial development bonds" and deleting the securities of charitable and religious organizations from the list of exempt securities. As to the latter, the drafters no doubt knew of the activities of Rex Humbard and his Cathedral of Tomorrow and acted to prevent the same from happening in Indiana.¹²⁸ Memberships in such organizations are still exempt. Subsection 23-2-1-2(b) which establishes certain exempt transactions, was also amended to increase the information that must be disclosed before nonissuer offers or sales by registered broker-dealers are exempt. This subsection also authorizes the commissioner to revoke any exemption because of the financial condition of the issuer or where there are insufficient shares or market makers to establish a "current market price."

An interesting addition, and one which the bar should find most helpful, is the language added to subsection 23-2-1-2(c) authorizing the commissioner to issue opinion letters on the meaning or interpretation of any section of the securities law or any rules issued thereunder. The provision specifies that the letters are not official statements and are not binding on the courts in judicial proceedings. Even with this proviso, however, these letters can aid Indiana corporate practitioners and attorneys with questions as to the interpretation of the law. There is a small fee for this service. With respect to fees in general under the law, the minimum fee for an application for registration was raised in subsection 23-2-1-6(b) to \$100, but the same section now provides for a maximum fee of \$500 except for certain types of companies. This last change will benefit large corporations.

The commissioner under new section 23-2-1-17.1, replacing repealed section 23-2-1-17, is now authorized to issue cease and desist orders and may sue in the name of the state for injunctive

¹²⁶15 U.S.C. §§ 80a-1 to -52 (1970).

¹²⁷Ch. 333, § 505, [1961] Ind. Act 984 (repealed 1975); ch. 255, § 11, [1967] Ind. Acts 694 (repealed 1975).

¹²⁸A brief sampling of such activities can be found in N.Y. Times, Jan. 18, 1974, at 11, col. 1; *id.* Feb. 13, 1973, at 9, col. 1; Washington Post, Feb. 13, 1973, at 1, col. 6.

relief or for the appointment of a receiver against persons violating the Indiana Securities Law. The remedy sections, both criminal and civil, were also amended. A new section 23-2-1-18.1 was added making violations of the statutes felonies. Previously, some violations were misdemeanors. Subsections 23-2-1-19(a) and (b) were amended to make purchasers as well as sellers civilly liable for violations. The new criminal provision clearly applies to investment advisors, but it is not clear whether the civil liability provisions apply to such persons. However, a court might be willing to imply a remedy to rectify an apparent oversight.¹²⁹

Another significant change is that the statute of limitations in subsection 23-2-1-19(e) has been increased from two to three years after the discovery of the violation. This provision, like the statute of limitations in the Business Takeover Law,¹³⁰ seems to mean actual and not constructive discovery. Unlike the Securities Act of 1933, which sets an outside limit for bringing suit,¹³¹ the Indiana statutes permit a defrauded purchaser or seller to bring suit any number of years following the actual transaction. However, the language does not preclude the possibility of laches.¹³²

3. Corporate Partnerships

A gap, or more accurately a possible gap, in the corporate authority of Indiana corporations was filled by the General Assembly. Subsection 23-1-2-2(b)(14)¹³³ was added to the Indiana General Corporation Act. The new subsection expressly empowers Indiana corporations "to be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other enterprise" Thus, doubts as to the authority of a corporation to be a partner or participate in other business ventures have been resolved.¹³⁴

¹²⁹There is precedent for this at both the federal level and the state level. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *People v. Hooker*, 147 N.Y.S.2d 605 (Sup. Ct. 1955); *Shermer v. Barker*, 2 Wash. App. 845, 472 P.2d 589 (1970).

¹³⁰See note 114 *supra*.

¹³¹115 U.S.C. § 77m (1970).

¹³²Waiver, estoppel, and laches are available as defenses to actions brought under rule 10b-5 even though the 1934 Securities Exchange Act does not have an express statute of limitations. *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568 (9th Cir. 1964); *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210 (9th Cir. 1962).

¹³³IND. CODE § 23-1-2-2(b)(14) (Burns Supp. 1975), amending *id.* § 23-1-2-2 (Burns 1972).

¹³⁴It is well settled in Indiana that corporations do not have the implied power to be a partner. See *Traders Loan & Invest. Co. v. Butcher*, 74 Ind. App. 548, 129 N.E. 257 (1920); *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N.E. 37 (1907). Both of these cases recognized the effect of provisions in the

There are some theoretical arguments against partnership arrangements for corporations, such as the concern that a partner might impinge on the directors' managerial prerogatives.¹³⁵ However, the statutory trend, following the leadership of the Model Business Corporation Act,¹³⁶ has been to permit participation. Furthermore, even without statutory sanction, specific provisions in articles of incorporation authorizing partnerships have been allowed as long as the partnership business is compatible with the scope of the corporation's articles.¹³⁷ In fact, a 1951 Indiana Attorney General Opinion¹³⁸ upholds this practice. The Opinion does not expressly refer to joint ventures, but there is little doubt that the rationale applies to other types of business ventures. Although the Opinion takes a contrary position, it is even arguable that the Indiana Uniform Partnership Act,¹³⁹ specifying corporations as persons who, or which, can be partners, impliedly amended the General Corporation Act. The courts are somewhat antipathetic to implied amendments,¹⁴⁰ but it would have been an interesting argument.

Even though the Opinion permits partnerships, amending the Act was wise since it now covers those corporations which do not

corporate articles authorizing partnerships, and *Traders Loan* acknowledged that a corporation could be estopped to deny partnership liability. See generally 1 CAVITCH § 15.07; 2 *id.* § 39.05[3]; CRANE & BROMBERG §§ 6, 9; 6 FLETCHER §§ 2520-22; HENN § 183, at 351-52; Armstrong, *Can Corporations be Partners?*, 20 BUS. LAW. 899 (1965); Annot., 60 A.L.R.2d 917 (1958).

¹³⁵See *Frieda Popkov Corp. v. Stack*, 198 Misc. 826, 103 N.Y.S.2d 507 (Sup. Ct. 1950); *Mallory v. Hananer Oil-Works*, 86 Tenn. 598, 8 S.W. 396 (1888). Many of the authorities cited in note 134 *supra* are critical of the ultra vires rationale. See, e.g., CRANE & BROMBERG § 9, at 52-53.

¹³⁶1 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 4(g), (p) (2d ed. 1971). See Comments to section 4(p), *id.* at 200-08. The language added to IND. CODE § 23-1-2-2 (Burns Supp. 1975) is taken from section 4(p) of the Model Act.

¹³⁷See *Lurie v. Arizona Fertilizer & Chem. Co.*, 101 Ariz. 482, 421 P.2d 330 (1969).

¹³⁸[1961] OPS. ATT'Y GEN. IND. NO. 74, at 227. The proposition was later reaffirmed. [1962] OPS. ATT'Y GEN. IND. NO. 90, at 91. See authorities cited note 134 *supra*.

¹³⁹See IND. CODE §§ 23-4-1-2, -6(a) (Burns 1972) (Uniform Partnership Act). The Indiana limited partnership statutes, *id.* §§ 23-4-2-1 to -31, do not define "person," but section 23-4-1-6(2) of the Indiana Uniform Partnership Act provides that the Uniform Partnership Act, which does define person, applies to limited partnerships except so far as the two acts are inconsistent. See generally CRANE & BROMBERG § 26. The drafters of the Uniform Partnership Act recognized that the capacity of a corporation to enter into partnerships is a corporate law matter. UNIFORM PARTNERSHIP ACT § 2 (1914). However, it is generally accepted that the Uniform Act does authorize corporate partnerships. *Memphis Natural Gas Co. v. Pope*, 178 Tenn. 580, 161 S.W.2d 211 (1941).

¹⁴⁰See, e.g., *United States v. Welden*, 377 U.S. 95, 102 n.12 (1964).

specifically refer to partnerships in their articles. The power might have been included in the articles had the drafter considered the matter, but without this foresight a corporation wishing to become a partner would have to go through the amendment process.¹⁴¹ No longer is this a problem since the general powers enumerated in the Act inhere to all corporations unless limited or restricted by law or the articles. Consequently, incorporators have a choice; if they do not want the corporation to enter into partnerships, the power can be excluded.

4. *Not-for-Profit Corporations*

The General Assembly also filled a rather substantial gap in the statutory provisions regulating meetings of the members and the directors of Indiana not-for-profit corporations. A new provision was added to the Not-for-Profit Corporation Act authorizing members of such corporations to vote by consent in writing on matters calling for membership action.¹⁴² The consent must be executed by all members entitled to vote on the issue beforehand, and it must be filed with the minutes of the proceedings of the members. The consent has the effect of a unanimous vote of the members. Similar informal action by the board of directors or any committee of the board is now also authorized.¹⁴³ This authority can be limited by the articles of incorporation if desired. The provisions of the Not-for-Profit Corporation Act are now in line with the provisions in the General Corporation Act regulating meetings of shareholders¹⁴⁴ and directors.¹⁴⁵ The new provisions will make the running of the affairs of these corporations more efficient, although the membership provision might be impractical for all but the smallest groups.

A typographical error in the provision of the Act authorizing not-for-profit corporations to indemnify directors and officers¹⁴⁶ was corrected, but the legislature did not see fit to bring the provision in line with the comparable provisions in the General Corporation Act¹⁴⁷ and the Indiana Insurance Act.¹⁴⁸ The indemni-

¹⁴¹IND. CODE §§ 23-1-4-1 to -7 (Burns 1972).

¹⁴²*Id.* § 23-7-1.1-9(h) (Burns Supp. 1975), *amending id.* § 23-7-1.1-9 (Burns 1972).

¹⁴³*Id.* § 23-7-1.1-10 (Burns Supp. 1975).

¹⁴⁴*Id.* 23-1-2-9(i) (Burns 1972).

¹⁴⁵*Id.* § 23-1-2-11(i).

¹⁴⁶*Id.* § 23-7-1.1-4 (Burns Supp. 1975), *amending id.* § 23-7-1.1-4 (Burns Supp. 1974). The primary purpose of this amendment was to permit "tourist, amusement, and nonfreight-carrying railroad[s]" to incorporate under the Indiana Not-for-Profit Corporation Act. These railroads are becoming more and more common in this day of nostalgia.

¹⁴⁷*Id.* § 23-1-2-2(b) (9) (Burns Supp. 1975).

¹⁴⁸*Id.* § 27-1-7-2(b) (8) (Burns 1975).

fication provision was added to the Not-for-Profit Corporation Act in 1974 and the language is basically that of the pre-1973 General Corporation Act provision. Similarly, the inconsistencies contained in the provision authorizing the purchase of "director and officer" insurance by not-for-profit corporations were not eliminated.¹⁴⁹

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

In *Baker v. Sihsmann*¹ service of process by means of the nonresident motorist statute² was challenged on due process grounds. Plaintiff Sihsmann filed suit on May 30, 1973, against Baker for damages arising from an automobile accident. Sihsmann elected to serve Baker through the Indiana secretary of state, who received the summons on June 1, 1973. The secretary of state mailed the summons on June 4 and Baker received it on June 11. Sihsmann defaulted Baker on July 3, 1973, and took judgment against him two days later.

The court of appeals reversed. The summons sent to Baker was a printed form which advised him that he had 20 days, beginning the day after receipt, to respond to the complaint. The court held that this wording was not reasonably calculated to give Baker actual notice of the proceeding and an opportunity to be heard, and so violated fourteenth amendment due process.³ The court stated that the effect of the summons was to mislead

¹⁴⁹*Id.* § 23-7-1.1-4(b)(10) (Burns Supp. 1975). For a discussion of the 1973 amendments to the General Corporation Act see Galanti, *Corporations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 77, 103-09 (1973); for discussion of the 1974 amendments to the Not-for-Profit Corporation Act see Galanti, *Business Associations, 1974 Survey of Indiana Law*, 8 IND. L. REV. 24, 54-59 (1974).

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The author wishes to extend his appreciation to Paul F. Lindemann for his assistance in the preparation of this discussion.

¹315 N.E.2d 386 (Ind. Ct. App. 1974).

²IND. CODE § 9-3-2-1 (Burns 1973). The statute provides that the operation of a motor vehicle by a nonresident or by a resident who thereafter becomes a nonresident shall be deemed equivalent to an appointment by such person of the secretary of state as his attorney for service of process for actions growing out of motor vehicle collisions in which the nonresident is involved.

³See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Baker regarding the time that he had to respond to the complaint. The court did not hold that service of process by means of the nonresident motorist statute necessarily violated due process. If the summons had advised Baker that the time to respond would be computed from the date of service upon his agent, the secretary of state, the default judgment would have been affirmed.

Baker also argued that he was entitled to an additional three days because the summons was served by mail,⁴ as well as one additional day because the 23rd day would then fall on the Fourth of July.⁵ Sihsmann argued that service was complete when the secretary of state was personally served by the Marion County deputy sheriff. The court recognized that both arguments had merit, but allowed the additional time under the facts of the case. The determining factor in allowing the extension of time was that the mails were utilized in serving process.⁶

*Ball Stores, Inc. v. State Board of Tax Commissioners*⁷ also involved the computation of time under Trial Rule 6(A). A taxpayer attempted to appeal to a superior court a final administrative determination of the taxpayer's property assessment. The final determination was issued on May 11, 1972, and the taxpayer's complaint was filed with the trial court on June 7, 1972. The taxpayer sent the summons and complaint by certified mail on June 8, but the board did not receive them until June 12, after the statutory 30-day period for appeal had expired.⁸ However, the 30th day was June 10, a Saturday. After one change of venue, the trial court dismissed the complaint as not timely, and the court of appeals reluctantly affirmed.⁹

The supreme court granted a petition for transfer and reversed. The court held that the applicable statute was silent as to when the 30-day period expires when receipt of notice falls on a Saturday, Sunday, or holiday, and that therefore the pro-

⁴IND. R. TR. P. 6(E).

⁵Trial Rule 6(A) states that the last day of the period will not be included if it is a Saturday, Sunday, legal holiday, or a day the office in which the act is to be done is closed during regular business hours.

⁶See *State ex rel. Sargent & Lundy v. Vigo Superior Court*, 296 N.E.2d 785 (Ind. 1973) (Arterburn, J.), where the court held that "Trial Rule 6(E) very clearly provides an additional three (3) days if reliance is placed on the mail to give notice." *Id.* at 786.

⁷316 N.E.2d 674 (Ind. 1974).

⁸The statute provides that "[a]t any time within thirty (30) days after the board gives notice of its determination, an appeal may be taken by filing a written notice with the board asking for such appeal and designating the court to which such appeal is being taken . . ." IND. CODE § 6-1-31-4 (Burns 1972).

⁹307 N.E.2d 106 (Ind. Ct. App. 1974), noted in Taylor, *Administrative Law*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 12, 21-22 (1974).

visions of Trial Rule 6(A) would control.¹⁰ Dismissal of the suit, the court stated, would be contrary to the expressed legislative intent that the taxpayer act within the prescribed time limit. The court cited with approval the opinions of two Indiana authors that the provisions of the trial rules regarding computation of time govern unless a statute expressly provides its own procedure.¹¹

The rule of *Ball Stores* was followed in *Jenkins v. Yoder*.¹² An automobile accident occurred on December 18, 1971, and a complaint for personal injuries was filed on December 19, 1973. The defendant filed a motion for summary judgment, asserting that the claims was barred by the two year statute of limitations for torts.¹³ The trial court granted the motion. The court of appeals affirmed, following the *Ball Stores* rule that the applicable trial rule controls if a statute is silent as to how a time limitation should be computed. Following the provisions of Trial Rule 6(A), the court held that the statute of limitations began to run on December 19, 1971, and expired at midnight on December 18, 1973. As the latter date did not fall on a Saturday, Sunday, holiday, or a day on which the office was closed, the suit was barred by the statute.

The *Ball Stores* rule also did not help the plaintiff in *Wilks v. First National Bank*.¹⁴ The plaintiff was allegedly injured while at her job on April 8, 1970. A two year statute of limitations applies to workmen's compensation suits;¹⁵ thus her claim expired on April 8, 1972, a Saturday. Plaintiff mailed her claim to the Industrial Board on Monday, April 10, 1972, and the board received it on April 12. The board denied her claim as not timely. The court of appeals agreed. It recognized that the rule of *Ball Stores* required an extension of time to the next working day, which was April 10. However, the statute required that the notice be "filed" within two years,¹⁶ which contemplated actual receipt by the board within that period.¹⁷ As the claim was not actually received until April 12, it was not timely.¹⁸

¹⁰See note 5 *supra*.

¹¹1 A. BOBBITT, WORKS' INDIANA PRACTICE § 1.4, at 15 (5th ed. 1971); 1 W. HARVEY, INDIANA PRACTICE 437 (1969).

¹²324 N.E.2d 520 (Ind. Ct. App. 1975).

¹³IND. CODE § 34-1-2-2 (Burns 1973).

¹⁴326 N.E.2d 827 (Ind. Ct. App. 1975).

¹⁵IND. CODE § 22-3-3-3 (Burns 1974).

¹⁶*Id.*

¹⁷The court relied primarily on language in a prior Indiana case which defined filing as delivery to the proper officer and receipt by him to be kept on file. *Lawless v. Johnson*, 232 Ind. 64, 111 N.E.2d 656 (1953).

¹⁸The court refused to apply the definition of Trial Rule 5(E) to the case. This rule states that filing by registered or certified mail is complete on mail-

*Squarey v. Van Horne*¹⁹ raised the question whether a court could dismiss for lack of jurisdiction when a timely change of venue motion had been filed. The will and two codicils of the deceased were admitted to probate on September 1, 1972. On April 3, 1973, seven months and two days later, the contestor filed her complaint to set aside probate of the codicils on various grounds. In response appellees filed a motion to dismiss, asserting that the action was not filed within the statutory 6-month period.²⁰ Contestor then filed a timely motion for a change of venue. The trial court heard arguments on the motions, considered the jurisdictional motion first, and dismissed the action.

On appeal the contestor argued that at the time the trial court sustained the motion to dismiss, it lacked jurisdiction to do anything but grant the requested venue change. The court of appeals rejected this argument, holding that determination of an alleged lack of jurisdiction takes precedence over ruling on a requested change of venue. The venue rules recognize that there are rulings that must be made between the time of a motion for a change of venue and the time the court rules on the motion.²¹ Furthermore, when the court lacks subject matter jurisdiction, the court is without power to do anything in the case except enter an order of dismissal.²² Therefore, since the 6-month requirement is jurisdictional²³ and no excuse appeared for failure to comply with the statute, the court of appeals held that dismissal of the action was proper.

In *State ex rel. Leffingwell v. Superior Court No. 2*,²⁴ an original action for a writ of prohibition was brought in the supreme court. In that case a 15-year-old girl and an 18-year-old boy had applied to the Blackford County Court for a waiver of the minimum age for marriage. The girl was not then pregnant, but had already given birth to a child fathered by the boy. The judge ordered the clerk to issue a marriage license to the couple. Upon the clerk's refusal to comply with the order, the judge cited the

ing. The court cautioned that no trial rule besides 6(A) has been held by the supreme court to be applicable to administrative proceedings. 326 N.E.2d at 831.

¹⁹321 N.E.2d 858 (Ind. Ct. App. 1975).

²⁰IND. CODE § 29-1-7-17 (Burns 1972).

²¹Trial Rule 78 states in part:

Nothing in this rule shall be construed as divesting the original court of its jurisdiction to hear and determine emergency matters between the time that a motion for change of venue to another county is filed and the time that the court grants an order for the change of venue.

²²321 N.E.2d at 858-59, citing *State ex rel. Ayer v. Ewing*, 231 Ind. 1, 106 N.E.2d 441 (1952).

²³321 N.E.2d at 860, citing *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N.E. 592 (1897).

²⁴321 N.E.2d 568 (Ind. 1974).

clerk for contempt. The supreme court granted the writ of prohibition and mandated the respondent court to dismiss the charge of contempt against the clerk. The court held that the respondent court had no jurisdiction to issue the order as the girl was not pregnant at the time of application for the license.²⁵ Since the court had no jurisdiction to issue the order, the clerk could not be held in contempt for failure to obey it.²⁶

In *Foster v. County Commissioners*,²⁷ the court of appeals reaffirmed the principle that a tort claimant of a county must, as a matter of jurisdiction, file his claim with the county auditor prior to commencing suit. Foster filed suit for his personal injuries suffered when his vehicle hit a chuckhole on one of the county highways. After discovery, the trial court entered summary judgment in favor of the county because of Foster's failure to file his claim with the county as required by statute.²⁸ The court of appeals affirmed the grant of summary judgment. It cited several old Indiana cases holding that notice to the county is required prior to commencing suit against it. The court declined Foster's invitation to overrule those cases.²⁹ The county's 10-month delay in raising lack of notice could not help Foster since the county could not waive statutory subject matter jurisdiction. The *Foster* decision has been overruled in part by *Thompson v. City of Aurora*,³⁰ a case which is discussed in the next section.

²⁵IND. CODE § 31-1-1-1 (Burns Supp. 1975) requires that a female who is under 17 years old be pregnant before the judge can authorize issuance of a marriage license, provided the female is at least 15 years old. This section also requires that the putative father and the pregnant female indicate to the judge a desire to marry and that the parents' or guardians' consent be obtained.

²⁶The supreme court apparently issued the writ under Appellate Rule 4(A) (5), which states that the supreme court has exclusive jurisdiction of the supervision of the exercise of jurisdiction by the other courts of the state, including the issuance of writs of mandate and prohibition.

²⁷325 N.E.2d 223 (Ind. Ct. App. 1975).

²⁸IND. CODE § 17-2-1-1 (Burns 1974) provides:

Whenever any person or corporation shall have any legal claim against any county in the state of Indiana, they shall file such claim with the county auditor, and be by him presented to the board of county commissioners.

Indiana courts are deprived of jurisdiction of claims if this procedure is not followed. *Id.* § 17-2-1-4.

²⁹*Board of County Comm'rs v. Nichols*, 139 Ind. 611, 38 N.E. 526 (1894); *Bass Foundry & Mach. Works v. Board of County Comm'rs*, 141 Ind. 68, 32 N.E. 1125 (1893); *Board of County Comm'rs v. Leggett*, 115 Ind. 544, 18 N.E. 53 (1888); *Bass Foundry & Mach. Works v. Board of County Comm'rs*, 115 Ind. 234, 17 N.E. 593 (1888).

³⁰325 N.E.2d 839 (Ind. 1975).

B. Pleadings and Pretrial Motions

In *Barrow v. Weddle Brothers Construction*,³¹ the plaintiff brought an action for abuse of process and defamation of character. On appeal from a negative judgment, plaintiff argued that he was entitled to judgment as a matter of law. The defendant responded by contending that the complaint did not accord him notice of the plaintiff's two theories of recovery and that the statute of limitations barred both theories. The court of appeals refused to allow the defense of the statute of limitations since the defendant did not specifically plead it as required by Trial Rule 8(C). The court then decided that the complaint was sufficient to present both theories. *Barrow* demonstrates the need to plead specifically the defenses required by Trial Rule 8(C) if they have any possible application to the plaintiff's claim; otherwise the defenses are waived.

In *Thompson v. City of Aurora*,³² the Indiana Supreme Court considered whether compliance with the statutory requirements for notice to a city of claims against it³³ need be specifically pleaded by the plaintiff as an element of his claim for relief. The plaintiff sued the city of Aurora for damages resulting from the destruction of the plaintiff's home by a natural gas explosion and fire. At the close of plaintiff's evidence, the defendant moved for a judgment on the evidence on the grounds that the plaintiff had failed to introduce proof that the statutorily required notice had been given to the city. The trial court sustained the defendant's motion, and the court of appeals affirmed,³⁴ citing *City of Indianapolis v. Evans*³⁵ as controlling authority for the proposition that plaintiff was required to plead and prove that notice was given.

In reversing, the supreme court held that the notice required by statute was a procedural precedent that need not be specifically averred in the complaint; that the plaintiff's failure to give the required notice was a defense that must be raised either by motion or responsive pleading;³⁶ and that if the defendant does not raise

³¹316 N.E.2d 845 (Ind. Ct. App. 1974).

³²325 N.E.2d 839 (Ind. 1975).

³³Ch. 80, § 1, [1935] Ind. Acts 235, as amended IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1975). The current notice statute provides that a claim against the state or a political subdivision thereof is barred unless notice is filed with (1) the attorney general and the state agency involved in the case of a claim against the state, or (2) the governing body of the particular political subdivision of the state when the claim is against the subdivision within 180 days after the loss occurred. IND. CODE §§ 34-4-16.5-6, -7 (Burns Supp. 1975).

³⁴313 N.E.2d 713 (Ind. Ct. App. 1974).

³⁵216 Ind. 555, 24 N.E.2d 776 (1940).

³⁶See IND. R. TR. P. 12(B).

the issue of notice, the plaintiff does not have to prove that notice was in fact given. The court went on to state that Trial Rule 9 (C)³⁷ controls those cases, such as the present case, in which the giving of a statutorily required notice is a true condition precedent to the action. Thus, in such cases, the plaintiff could aver generally the performance of all conditions precedent, and the defendant would have to specifically deny the performance of the condition precedent by the plaintiff; a general denial would be insufficient to raise the issue of notice. In reaching its decision, the court overruled the series of cases beginning with *Touhey v. City of Decatur*³⁸ and ending with *City of Indianapolis v. Evans*³⁹ insofar as the pleading and procedural rules set forth therein were concerned.

The decision in *Thompson* came about 2½ weeks after the decision in *Foster v. County Commissioners*,⁴⁰ discussed above. In *Foster* the plaintiff failed to give notice to the defendant county as required by statute.⁴¹ The court of appeals ruled that the county had not waived its right to complain of the lack of notice even though more than 10 months had passed since the suit was filed and the defendant had long since filed its answer. The court of appeals reasoned that the filing of the claim with the county constituted a jurisdictional precondition for the trial court's entertainment of the action. Absent filing of the claim, there was a lack of subject matter jurisdiction which could be raised at any time during the proceeding.⁴² *Thompson* clearly overruled the remaining language in *Foster* concerning the prerequisite of notice to the filing of a suit against a municipality, as distinguished from notice requirements which are preconditions to the jurisdiction of a trial court.

³⁷Trial Rule 9(C) provides:

In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.

³⁸175 Ind. 98, 93 N.E. 540 (1911). *Touhey* is typical of the line of cases overruled by *Thompson*. The plaintiff in *Touhey* suffered a demurrer as a consequence of his failure to allege that he had given written notice of his claim to either the clerk, mayor, or a member of the common council of the defendant municipality. The trial court's action in sustaining the demurrer was affirmed on appeal and plaintiff was thus denied recovery for his injuries, allegedly the result of his falling through an opening in a public sidewalk.

³⁹216 Ind. 555, 24 N.E.2d 776 (1940).

⁴⁰325 N.E.2d 223 (Ind. Ct. App. 1975).

⁴¹See p. 70 *supra*.

⁴²The defense of failure to state a claim upon which relief can be granted can be raised for the first time at trial. IND. R. TR. P. 12(H) (2).

During the past year the court of appeals again considered the standard by which the sufficiency of the pleadings is to be determined when attacked by a motion to dismiss for failure to state a claim upon which relief could be granted. In *Gentry v. United Slate, Tile & Construction Roofers, Local 250*,⁴³ the plaintiff-subcontractor sued the primary contractor and a labor union claiming damages as a result of the union's attempt to compel the primary contractor to breach its contract with the plaintiff because the plaintiff employed nonunion laborers. The trial court dismissed the complaint pursuant to Trial Rule 12(B) (6) due to the plaintiff's failure to allege that the parties were engaged in industry or activity affecting interstate commerce and to specifically identify the section number of the United States Code under which the plaintiff was proceeding.

The court of appeals reversed, citing the supreme court's decision in *State v. Rankin*,⁴⁴ which held that a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. The *Gentry* court was unable to say as a matter of law that under no circumstances could the plaintiff show that the parties were engaged in industry or activity affecting interstate commerce. The court also said that to require the plaintiff to specifically set forth in its complaint the sections of the United States Code under which it was proceeding would be tantamount to requiring a statement in the complaint of the theory upon which the claim for damages was based. Under the liberal rules and spirit of notice pleading, such a statement is not required in order to withstand a motion to dismiss under Trial Rule 12(B) (6).

The timeliness of a defendant's demand for a jury trial was the issue in *Houchin v. Wood*.⁴⁵ The defendant against whom a paternity declaration was sought filed a request for a jury trial 43 days after receiving notice of the pending action. The court of appeals ruled that the request was not timely because the issues in a paternity action are closed by operation of law with the filing of a petition.⁴⁶ According to Trial Rule 38(B), the demand for a jury trial must be filed within 10 days after the first responsive pleading, at which time the issues in a case would normally be closed; if no responsive pleading is required, then demand must be filed within 10 days after such pleading otherwise would have been required. Trial Rule 6(C) requires that a necessary responsive plead-

⁴³319 N.E.2d 159 (Ind. Ct. App. 1974).

⁴⁴260 Ind. 228, 294 N.E.2d 604 (1973), noted in Harvey, *Civil Procedure and Jurisdiction*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 24, 25 (1973).

⁴⁵317 N.E.2d 911 (Ind. Ct. App. 1974).

⁴⁶See *Roe v. Doe*, 289 N.E.2d 528 (Ind. Ct. App. 1972).

ing be filed within 20 days after service of the prior pleading. Therefore, the request for a jury trial in a paternity action must be filed within 30 days after service of the complaint; that is, the sum of the 20 days allowed by Trial Rule 6(C) and the 10 days allowed by Trial Rule 38(B).

A void in the application of Trial Rule 79 was judicially filled by the supreme court in *Castle v. Fleenor*.⁴⁷ A motion for a change of venue from a regular judge was filed under Trial Rule 76. A special judge was qualified after being selected from the first panel that was named pursuant to the procedure set forth in Trial Rule 79(3). Thereafter that special judge died, and a petition for the appointment of a special judge to replace the deceased judge was filed in the supreme court. In granting the petition, the court observed that the Indiana Rules of Trial Procedure did not provide a procedure for the selection of an alternate judge in the particular situation before the court. Trial Rule 79(3) provides that the regular judge shall appoint a panel from which a special judge shall be selected, and Trial Rule 79(8) provides for this procedure to be repeated if the person selected fails to appear and qualify within 10 days. Trial Rule 79(12) provides for the selection of a new judge to be made by the supreme court when the person selected under Trial Rule 79(8) either fails to qualify or becomes disqualified. There was, observed the court, no provision in the rules covering the situation where the person selected under Trial Rule 79(3) qualifies and subsequently becomes disqualified. Accordingly, the court granted the petitioner's request and appointed an alternative judge to sit in the pending case.

In *State ex rel. Chambers v. Jefferson Circuit Court*,⁴⁸ an original mandamus action in the supreme court, the court ruled that a responsive pleading is not required following the filing of the complaint in a condemnation action. Therefore, under Trial Rule 76(3) relators in the case had 30 days from the filing of the complaint in the condemnation proceeding within which to file a motion for a change of venue from the regular judge.⁴⁹ The court overruled the decision in *State ex rel. Indianapolis Power & Light Co. v. Daviess Circuit Court*⁵⁰ to the extent that it stood for the proposition that the filing of a complaint in an eminent domain action does not close the issues for purpose of a Trial Rule 76 motion.

⁴⁷318 N.E.2d 567 (Ind. 1974).

⁴⁸316 N.E.2d 353 (Ind. 1974).

⁴⁹Trial Rule 76(3) provides that parties have 30 days from the filing of the case to request a change of venue in all cases when no pleading is required by the defendant to close the issues.

⁵⁰246 Ind. 468, 206 N.E.2d 611 (1965).

*State ex rel. Krochta v. Superior Court*⁵¹ involved the timeliness of a Trial Rule 76(1) change of venue motion. The case originated as a class action for mandate and damages to require the Lake County Commission on County Redistricting to comply with statutory requirements⁵² in conducting the 1974 primary election. The defendant state and county officers filed motions to dismiss, and the trial court scheduled a hearing on the motions. When the hearing date arrived, the defendants withdrew their motions to dismiss. A hearing on the merits was then had as to the state officers, but a continuance was granted as to the county officers. Thereafter the county officers moved pursuant to Trial Rule 76(1) for a change of venue from the judge. The trial judge denied the motion and issued an order of mandate, thereby giving the plaintiffs the relief they sought. After unsuccessfully seeking a stay of the order in the trial court, the defendants filed an original action of mandate and prohibition in the supreme court, seeking to set aside all action taken by the trial court after the motion for a change of venue was made.

The supreme court denied the requested writ and confirmed the propriety of the trial court's denial of the motion for a change of venue. The court ruled that the county officials waived their right to an automatic change of venue by failing to object at the commencement of the initial hearing on the merits that was conducted as to the state officials. The court also grasped the opportunity to reaffirm the disfavor with which original actions for extraordinary writs are judicially viewed. It noted that such writs are not vehicles for circumventing the normal appellate process and that they should be granted only when a denial would result in extreme hardship.⁵³

In *Marsh v. Lesh*⁵⁴ the plaintiff sued to recover damages for personal injuries sustained in a parking lot collision. The defendant moved for a change of venue from Lake County to Porter County. The original trial court granted the motion with the consent of plaintiff's attorney. Thereafter the plaintiff commenced discovery in the transferree court. Approximately nine days before the scheduled trial, the plaintiff filed a motion to expunge the order of the Lake Superior Court granting the change of venue, alleging that the automatic change of venue provisions of Trial Rule 76 were unconstitutional. This motion was overruled by the Porter Superior Court. On appeal from a negative judgment, the plaintiff again sought to assert the unconstitutionality of the venue provi-

⁵¹314 N.E.2d 740 (Ind. 1974).

⁵²IND. CODE §§ 17-1-1-1 *et seq.* (Burns 1974).

⁵³IND. R. P. ORIG. A. (A).

⁵⁴326 N.E.2d 626 (Ind. Ct. App. 1975).

sions. The court of appeals cited *Center Township v. Board of Commissioners*⁵⁵ as controlling authority in holding that the plaintiff's consent to the change of venue and his subsequent discovery activities in the transferee court estopped him from challenging the propriety of the transferee court's venue.

Marsh establishes the rule that in order to challenge the venue of the court to which a case is transferred pursuant to a Trial Rule 76 motion, a party must do so at the time the motion for the change of venue is before the potential transferee court; otherwise, he will have waived any objection to the transfer. Of course, nothing in the court's opinion precludes a party from asserting a lack of subject matter jurisdiction at any time in the proceedings in either the transferee or transferor court. The decision in *Marsh* is consistent with that of *State ex rel. Hepler v. Superior Court*⁵⁶ wherein the relatrix's petition for a writ of mandate and prohibition was denied. The court stated that the relatrix's consent to the trial court's setting of the matter for trial constituted a waiver of the right to an automatic change of venue from such court.

C. Pretrial Procedures and Discovery

In *Scott County School District #1 v. Asher*,⁵⁷ the court of appeals dealt with the question of whether a trial court's failure to enter an order pursuant to Trial Rule 16(J)⁵⁸ reciting the action taken at a pretrial conference constitutes reversible error. The court of appeals agreed with the appellant that the trial court might have erred in failing to enter a pretrial order. However, the court held that any error was, in this particular case, harmless error as defined in Trial Rule 61.⁵⁹ The court observed that the record clearly showed that no agreement existed between the parties concerning the limitation of issues for trial. Absent such an agreement, a failure by the trial court to enter a pretrial order limiting the issues for trial did not substantially prejudice the rights of the parties.

⁵⁵110 Ind. 579, 10 N.E. 291 (1887).

⁵⁶328 N.E.2d 218 (Ind. 1975).

⁵⁷312 N.E.2d 131 (Ind. Ct. App. 1974).

⁵⁸Trial Rule 16(J) provides in part:

The court shall make an order which recites the action taken at the [pretrial] conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreement of counsel, and such order when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice.

⁵⁹Trial Rule 61 in part provides: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

In *Bramblett v. Lee*⁶⁰ the court of appeals ruled that the client was bound by a stipulation of paternity made orally by counsel in a pretrial conversation with the trial judge. The court stated that the client's redress would come, if at all, from the attorney who made the stipulation. *Bramblett* emphatically demonstrates the very great authority that an attorney has to enter into agreements and to make judicially recorded entries that will be binding on the client.

During the past year, Trial Rule 26 and the other rules concerning discovery procedures that are available in civil actions again provided a fertile field for litigation. In *State v. Frye*⁶¹ the court of appeals considered whether a party seeking to compel discovery in an administrative proceeding must first seek the aid of the administrative agency before resorting to the enforcement mechanisms provided by a court of law under Trial Rule 37. The appellee, a chaplain at the Rockville Training Center in Parke County, filed a grievance appeal with the State Employees' Appeals Commission. In pursuing the appeal, the plaintiff's attorney submitted questions to the officials at the Center that were deemed by the parties to be "interrogatories." The state agency refused to order the Center officials to furnish answers to the interrogatories. The plaintiff then requested the Parke County Circuit Court to order under Trial Rule 37(A)(2)⁶² that the officials respond to the interrogatories. The circuit court decreed that the officials should furnish the information.

The court of appeals reversed. It ruled that the trial court could not properly entertain the action to compel discovery until such time as the state administrative agency had ordered that the interrogatories be answered and such order had not been obeyed by the party against whom discovery was sought. At that point the party filing the interrogatories could go before the appropriate court and seek the relief provided by Trial Rules 28(F)⁶³ and 37(A)(2). However, it was incumbent upon the appellee in this case to exhaust his administrative remedies prior to seeking the

⁶⁰320 N.E.2d 778 (Ind. Ct. App. 1974).

⁶¹315 N.E.2d 399 (Ind. Ct. App. 1974).

⁶²Trial Rule 37(A)(2) provides in part: "If . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may apply for an order compelling an answer"

⁶³Trial Rule 28(F) provides:

Whenever a hearing before an administrative agency is required parties shall be entitled to all discovery provisions of Rules 26 through 37. Protective and enforcement orders shall be issued by a court of the county where discovery is being made or where the hearing is to be held. Leave of court shall not be required as provided in Rule 30, and the agency shall make the determinations provided in Rule 36(B).

aid of the trial court. In short, the court ruled that if it is within the competency of the state agency to enforce the discovery that is sought between the parties before it, then enforcement must first be sought there. If the aggrieved party does not receive satisfaction, then he may proceed to the appropriate court for enforcement pursuant to Trial Rule 37.

*Indiana & Michigan Electric Co. v. Whitley County Rural Electric Membership Corp.*⁶⁴ involved a dispute concerning the relevancy of certain interrogatories that were directed by the defendant Indiana & Michigan Electric Company to the Rural Electric Membership Corporation. The plaintiff contended that the interrogatories were improper because they sought to discover a party's contention regarding a factual matter that was to be decided by the court. In reversing the trial court's grant of summary judgment for the plaintiff, the court of appeals held, pursuant to Trial Rules 26(B)(1)⁶⁵ and 33(B), that it was proper to seek discovery of an opinion, contention, or legal conclusion. Hence, since the challenged interrogatories fell within the broad scope of discovery, the trial court erred in sustaining plaintiff's objections to them.

The scope of discoverable information under Trial Rule 26(B)(1) was again considered by the court of appeals in *Chambers v. Public Service Co.*⁶⁶ The defendant-landowners sought to discover, by use of interrogatories and requests for the production of documents, certain information which they contended was relevant to their defense of the plaintiff's condemnation action. The condemnor intended to use defendant's land for the planned construction of a nuclear power plant. The defendant sought various information on the other land involved in the project and on permits the condemnor was required to obtain from the government. The condemnor objected to this line of discovery on the ground that the desired information was beyond the scope of discovery set forth in Trial Rule 26(B). The trial court sustained the objection.

The court of appeals reversed the trial court's ruling and remanded the case with instructions that the trial court overrule the condemnor's objection. In so doing, the court reaffirmed the broad construction that is to be given Trial Rule 26(B)(1) in furthering

⁶⁴316 N.E.2d 584 (Ind. Ct. App. 1974).

⁶⁵Trial Rule 26(B)(1) in part provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

⁶⁶328 N.E.2d 478 (Ind. Ct. App. 1975).

pretrial discovery in civil actions.⁶⁷ The court noted that the trial rules require only that the information sought be loosely relevant to the subject matter of the litigation and "be either (1) admissible, or (2) reasonably calculated to lead to other evidence which will be admissible."⁶⁸ The court thought that the information requested by the defendants was relevant to the issue of whether the condemnor had put forth a good-faith offer for the realty; the trial court thus erred in not directing the condemnor to respond to the interrogatories.

D. Trial and Judgment

In the past year, the Indiana appellate courts have considered many issues surrounding jury instructions. In *Birdsong v. ITT Continental Baking Co.*,⁶⁹ the trial court had permitted a jury instruction that the plaintiff's failure to have his seatbelt fastened, while not contributing to the cause of the accident, could have contributed to cause his injuries; therefore, as to the extent of the injuries caused, the plaintiff's failure to use his seatbelt could be viewed as contributory negligence.

The court of appeals reversed in a divided opinion and granted the plaintiff a new trial. Judge Staton's opinion stated that the instruction permitted the jury to consider degrees of negligence, a principle not recognized in Indiana.⁷⁰ Where the instruction given does not conform to the substantive law of Indiana, the appellate court must assume that it influenced the result in the trial court unless it appears from the evidence or the record that the verdict under proper instruction could not have been different. Judge Staton also stated that the combined effect of the instructions was to mislead the jury, since two other of the plaintiff's instructions informed the jury of the definition and effect of contributory negligence in Indiana. Judge Lybrook concurred in the result, stating that the instruction invited the jury to engage in pure speculation as to what injuries would have been prevented had the seatbelt been used.

*Easley v. Williams*⁷¹ raised the issue of the combined effect of jury instructions. In the trial court the defendant was permitted to have six instructions which dealt with contributory negligence tendered to the jury. Following a verdict for the defendant, the trial court, pursuant to Trial Rule 59, granted the plaintiff a new

⁶⁷See *Tobe Deutschmann Corp. v. United Aircraft Prods., Inc.*, 15 F.R.D. 363 (S.D.N.Y. 1953).

⁶⁸328 N.E.2d at 482.

⁶⁹312 N.E.2d 104 (Ind. Ct. App. 1974).

⁷⁰See *Pawlish v. Atkins*, 96 Ind. App. 132, 182 N.E. 636 (1932).

⁷¹321 N.E.2d 752 (Ind. Ct. App. 1975).

trial on the ground that the issue of contributory negligence had been overemphasized. Over a strong dissent, the court of appeals affirmed the trial court's grant of a new trial. The majority explained its decision as follows:

Our reading of those instructions reveals that they were in fact repetitious each repeating, although in somewhat different language, the elements of contributory negligence. When those instructions are read in light of the instructions as a whole we agree that the issue of contributory negligence was unduly emphasized such that the giving of those instructions was error.⁷²

Other issues concerning jury instructions were raised in *Hobby Shops, Inc. v. Drudy*.⁷³ In this case two actions were consolidated for trial and defendant tendered a list of twenty-two proposed instructions. The trial court refused to give all of the proffered instructions. In affirming the trial court, the court of appeals, pointing to the language of Trial Rule 51(D) which gives each party the right to tender no more than ten instructions, held that the consolidation of two actions does not double that number. The defendant contended that the plaintiff waived the limit of ten instructions by failing to object to the excessive instructions when they were offered. Again relying on Trial Rule 51(D), the court quoted the language in the rule which states that "[n]o party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by this rule."⁷⁴ Since the mandate of the rule controls, the failure of the plaintiff to object was irrelevant.

*Wolff v. Slusher*⁷⁵ brought into focus the duty of the trial judge to instruct the jury properly. The plaintiff and one defendant had entered into an oral contract for the clearing of timber on that defendant's land. A second defendant, the lessee of the owner-defendant, used part of the property for farming. The plaintiff brought an action seeking damages and a writ of replevin to recover his equipment after the defendants had barred his access to the farm. The defendants then counterclaimed alleging that the plaintiff had cut trees other than those authorized and that the plaintiff had failed to clean up the property after removing the timber. The lessee also counterclaimed for destruction of crops and fences and for failure to clean up the premises. The trial judge gave the jury five verdict forms to use; the first form allowed them to find for the plaintiff against both defendants, the next two forms

⁷²*Id.* at 754.

⁷³317 N.E.2d 473 (Ind. Ct. App. 1974).

⁷⁴*Id.* at 477.

⁷⁵314 N.E.2d 758 (Ind. Ct. App. 1974).

provided for recovery by the plaintiff against either defendant, and the final two forms dealt with the recovery by the defendants against the plaintiff on their separate counterclaims. The jury returned two verdicts for plaintiff, one against both defendants and another for the plaintiff against the defendant-owner individually. The jury made no findings with respect to the defendants' counterclaims.

On appeal, the court reversed on the issue of improper inclusion of gross profits in the damages awarded.⁷⁶ The court then commented in dictum on the verdict forms used and the resulting confusion of the jury. The plaintiff contended that since the defendants had not objected to the verdict forms, they had waived any alleged error. The court stated that although failure to object to the verdict forms may have waived the error, the trial court's fundamental responsibility to properly instruct the jury cannot be ignored.⁷⁷ The court left the impression that if it felt that the jury was unable to understand the issues, failure of a party to object to jury instructions would not prevent the court from reversing.

Trial Rule 60 received considerable attention at the appellate level in the past year. In *Hooker v. Terre Haute Gas Corp.*,⁷⁸ a suit filed in 1966 was dismissed with prejudice in 1972, pursuant to Trial Rule 41(E), for failure to prosecute the action. The plaintiff filed a motion to reinstate the cause of action, which was denied. The plaintiff then filed a motion under Trial Rule 60(B)(1) to set aside the judgment on the ground of excusable neglect. The court of appeals noted that a dismissal with prejudice may be set aside only in accordance with Trial Rule 60(B).⁷⁹ Thus, plaintiff's motion to reinstate the cause was held to be a Trial Rule 60 motion, and its denial was a final judgment, which was appealable.⁸⁰ To perfect the appeal, the plaintiff was required by Trial Rule 59(C) to file a motion to correct errors within 60 days of the ruling on the motion; since no timely motion to correct errors had been filed, the plaintiff had lost his right to appeal. The court added that the plaintiff's subsequent Trial Rule 60(B) motion, which relied on the same basic ground as the original motion, could not be used to extend the time period in which to perfect plaintiff's appeal.⁸¹ The

⁷⁶The court of appeals noted that even though there had been no final judgment on the counterclaims, the court could review those issues which were decided.

⁷⁷See *Board of Comm'rs v. Flowers*, 136 Ind. App. 579, 201 N.E.2d 571 (1964).

⁷⁸317 N.E.2d 878 (Ind. Ct. App. 1974).

⁷⁹IND. R. TR. P. 41(F).

⁸⁰IND. R. TR. P. 60(C).

⁸¹317 N.E.2d at 881, citing *Davis v. Davis*, 306 N.E.2d 377 (Ind. Ct. App. 1974).

plaintiff also attempted to raise the failure to hold a hearing on the original dismissal, but the court found no authority under Trial Rule 60 for this procedure.

In *McFarland v. Phend & Brown, Inc.*,⁸² the plaintiffs moved under Trial Rule 60(B) (3) to set aside a judgment on the ground that an affiant had made a material misrepresentation in his affidavit in support of the defendant's motion for summary judgment. The case arose out of an automobile accident in which the plaintiffs' car struck a state-owned crane at an unmarked curve in the road. The plaintiffs sued the contractor who had been working on the road. The defendant subsequently filed a motion for summary judgment, attaching to it an affidavit signed by the secretary of the defendant-corporation in which the secretary asserted that all of the defendant's equipment had been removed from the site before the accident occurred. The plaintiffs filed no counter affidavits nor did they appear at the summary judgment hearing. The court granted the motion. One year later plaintiffs filed a motion under Trial Rule 60(B) (3) asserting that depositions taken after the judgment showed that there was a genuine issue of material fact as to whether defendants had been released under the contract and had been authorized to remove the warning signs. The trial court denied the motion.

The court of appeals affirmed. The court first noted that this was a case of first impression in Indiana. Holding that relief under Trial Rule 60(B) (3)⁸³ requires that the affiant knew or should have known that the representation made in the affidavit was false and that the misrepresentation must be made as to a material fact which would change the court's judgment, the court found that the representation made was not false. It was a conclusory representation based upon facts and inferences which the affiant placed in the best possible light. This was not the kind of misrepresentation meant to be covered by Trial Rule 60.

In *Warner v. Young America Volunteer Fire Department*,⁸⁴ the court of appeals stated that Trial Rule 60 is not a substitute for appeal and that the grounds for granting a Trial Rule 60 motion are limited to errors which could not have been discovered in time to be included in a timely motion to correct errors.⁸⁵ The defendant in answer to the plaintiff's complaint had alleged that plaintiff, as

⁸²317 N.E.2d 460 (Ind. Ct. App. 1974).

⁸³Trial Rule 60(B) (3) provides for relief from a final judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party."

⁸⁴326 N.E.2d 831 (Ind. Ct. App. 1975).

⁸⁵*Id.* at 834 n.4, citing 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 222 (1971).

denominated, lacked capacity to sue.⁶⁶ The plaintiff thereafter amended its complaint without curing the alleged defect, but the defendant did not renew his allegation in the answer to the amended complaint. Following judgment for the plaintiff, from which the defendant took no appeal although he filed a motion to correct errors, the defendant sought to have the judgment set aside under Trial Rule 60 on the grounds that the judgment was void and that it was no longer equitable that the judgment should have prospective application.⁶⁷

The court of appeals, relying on federal cases interpreting the corresponding federal rule, held that Trial Rule 60(B) (6) affords a means only for extraordinary relief, to be granted only on a showing of exceptional circumstances. A party cannot allow his time for appeal to lapse and then renew his remedy of appeal by a Trial Rule 60(B) motion. Accordingly, all alleged errors which were not included in the original motion to correct errors had been waived. As to the alleged errors that were included in the motion to correct errors, the court held that the defendant waived the defense of lack of capacity to sue by his failure to raise the defense in the answer to plaintiff's amended complaint. Consequently, the judgment was not void. The defendant also argued under Trial Rule 60(B) (7) that it was no longer equitable to permit the judgment to have prospective effect since the judgment could be used to deprive the defendant of his home and livelihood. The court held that there must be some change of circumstance since the entry of the original judgment and that the change of circumstance must not be reasonably foreseeable at the time of the entry of judgment, in order for a Trial Rule 60(B) (7) motion to succeed.

In *Yerkes v. Washington Manufacturing Co.*,⁶⁸ the trial court, in an action for malicious prosecution, granted defendant's motion for summary judgment. In addition, the trial court granted defendant's motion for judgment by default on its counterclaim. The plaintiff sought relief from the default judgment in his motion to correct errors, which was denied. In reversing in part and dismissing in part, the court of appeals held that the trial court erred in granting defendant's motion for summary judgment since a material issue of fact existed as to whether or not defendant had probable cause to initiate the prosecution.⁶⁹ In dismissing the attack on the default judgment on defendant's counterclaim, the court held that a default judgment can be set

⁶⁶Trial Rule 9(A) provides that lack of capacity to sue must be pleaded as an affirmative defense.

⁶⁷IND. R. TR. P. 60(B) (6), (7).

⁶⁸326 N.E.2d 629 (Ind. Ct. App. 1975).

⁶⁹See *Tapp v. Haskins*, 310 N.E.2d 288 (Ind. Ct. App. 1974).

aside only in accordance with Trial Rule 60(B)⁹⁰ and that the allegations in plaintiff's motion to correct errors seeking to set aside the default thus must be treated as a Trial Rule 60 motion. Furthermore, the denial of the motion to correct errors constituted a final judgment pursuant to Trial Rule 60(C); therefore, the plaintiff was required to file an additional motion to correct errors to perfect his appeal. By his failure to do this, the plaintiff waived his right to appeal the default judgment on the counterclaim,⁹¹ and the court dismissed that part of the appeal.

With respect to Federal Rule of Civil Procedure 60(b), the Seventh Circuit Court of Appeals in the case of *Washington v. Board of Education*⁹² stated that the district court may consider a rule 60(b) motion during the pendency of an appeal. If the district court is inclined to grant that motion, then application can be made to the appellate court for a remand of the appeal.

*Gumz v. Bejes*⁹³ involved the right to trial by jury. Defendant Gumz had built dikes and ditches equipped with water pumps to prevent the flooding of his farm. Since the equipment also benefited his neighbors' property, Gumz asked them to help pay the cost of his dikes and pumps. When the neighbors did not contribute, Gumz changed his flood control system; as a result, the neighbors' lands were flooded. The neighbors filed suit for an injunction and damages. Gumz counterclaimed for an injunction to require removal of the neighbors' alleged obstructions in his drainage ditch and for damages. The trial court refused Gumz's request for a jury trial and granted an injunction and nominal damages to the neighbors.

On the basis of *Hiatt v. Yergin*,⁹⁴ the court of appeals affirmed the trial court's refusal to grant a jury trial. Gumz attempted to avoid the *Hiatt* rule that a jury trial is not required if the essential character of the claim is equitable by arguing that the essential nature of his claim was altered by a pretrial order of the court. The pretrial order had recognized that a portion of the damages claimed by Gumz was based on the legal theory of trespass. However, the court of appeals found that this was merely recognition of one issue in the case; the essential character of the claim was not altered.

*Vernon Fire & Casualty Insurance Co. v. Sharp*⁹⁵ raised the issue of whether the trial judge or the jury should construe an

⁹⁰IND. R. TR. P. 55(C). See 3 W. HARVEY, INDIANA PRACTICE 521 (1970).

⁹¹See *Renfro v. State*, 316 N.E.2d 405 (Ind. Ct. App. 1974).

⁹²498 F.2d 11 (7th Cir. 1974).

⁹³321 N.E.2d 851 (Ind. Ct. App. 1975).

⁹⁴152 Ind. App. 497, 284 N.E.2d 834 (1972).

⁹⁵316 N.E.2d 381 (Ind. Ct. App. 1974).

unambiguous contract. The court of appeals, citing a prior case,⁹⁶ held that the trial judge should construe an unambiguous contract. However, it was not error to allow the jury to construe the contract if it appeared from the record that they placed a correct construction on it.⁹⁷ The court found that the jury properly construed the contract.

*Stephens v. Shelbyville Central Schools*⁹⁸ concerned the amount of time allowed for final argument. The trial court had permitted the defendant four additional minutes of argument to counter new matters brought out in plaintiff's rebuttal. The court of appeals, relying on an Indiana statute,⁹⁹ held that the party with the burden of proof generally opens and closes final argument; however, an exception is recognized when new matters are raised in the rebuttal. When this occurs, the adverse party has the right of reply. The court, in affirming the trial court, referred to the broad discretion that is granted to a trial court and the fact that a trial judge often is faced with a difficult question requiring an immediate decision. Even if the trial court's decision was erroneous, the court of appeals was unable to say that the grant of four additional minutes of argument constituted reversible error.

*Ingmire v. Butts*¹⁰⁰ raised the issue of the power of a master commissioner to enter judgment. The plaintiffs filed an action seeking rent and damages for alleged breaches of a lease. Subsequently, plaintiffs filed an action for possession, and a writ of ejectment was issued. During pretrial proceedings all matters were conducted before the circuit court judge. However, trial was held before and judgment rendered by a master commissioner. Four months after judgment was rendered, the circuit court judge certified the appointment of the master commissioner as being duly appointed and authorized during the hearing of evidence. The court of appeals refused to hear the appeal. It held that there was no judgment in the case rendered by a judicial officer, and therefore there was no appeal. The court held that both the statute¹⁰¹ and Trial Rules 53(E) (1) and (2) limit a master commissioner to hearing the evidence and preparing a report for the trial court. Only a judge has the power to enter a judgment. The court

⁹⁶United States Fidelity & Guar. Co. v. Baugh, 146 Ind. App. 583, 257 N.E.2d 699 (1970).

⁹⁷See *Vulcan Iron Works Co. v. Electric Magnetic Gold Mining Co.*, 54 Ind. App. 28, 99 N.E. 429 (1912).

⁹⁸318 N.E.2d 590 (Ind. Ct. App. 1974).

⁹⁹IND. CODE § 34-1-21-1 (Burns 1973).

¹⁰⁰312 N.E.2d 885 (Ind. Ct. App. 1974).

¹⁰¹IND. CODE § 43-1-25-3 (Burns 1973).

did not dismiss the appeal but suspended consideration of it until such time as a final judgment was rendered.

In *Sekerez v. Board of Sanitary Commissioners*,¹⁰² the court of appeals had an opportunity to correct a statement made in an earlier opinion.¹⁰³ In the first opinion the court had taken the position that facts not found by the trial court are taken as not proved. Noting the mandate of Trial Rule 52(D),¹⁰⁴ the court of appeals corrected their earlier position, holding that the failure of a trial court to enter a finding of fact which is requested by the party who has the burden of producing evidence to show that fact does not create a presumption against that party that the fact was not found or that the evidence was insufficient to support the finding.

In *Jacob Weinburg News Agency, Inc. v. City of Marion*,¹⁰⁵ the plaintiff news agency, a distributor of magazines, brought a declaratory judgment action under Trial Rule 57 seeking to declare a city ordinance unconstitutional as a abridgment of freedom of the press and of various property rights. The trial court dismissed the action because, *inter alia*, "declaratory relief has been denied in Indiana where it involves determination of serious criminal liability."¹⁰⁶ The court of appeals reversed, holding that the supreme court's adoption of Trial Rule 57 had enlarged the classes of people entitled to obtain declaratory relief. The court noted that Trial Rule 57 was almost a verbatim duplicate of rule 57 of the Federal Rules of Civil Procedure,¹⁰⁷ and that federal decisions would grant standing to the plaintiffs under the federal rule.¹⁰⁸ The court stated that adoption of Trial Rule 57 had the effect of overruling *Department of State v. Kroger Grocery & Baking Co.*¹⁰⁹ and deeply eroding the authority of *Bryarly v.*

¹⁰²312 N.E.2d 98 (Ind. Ct. App. 1974).

¹⁰³*Sekerez v. Board of Sanitary Comm'rs*, 309 N.E.2d 460 (Ind. Ct. App. 1974).

¹⁰⁴Trial Rule 52(D) (2) provides that "[t]he court's failure to find upon a material issue . . . shall not be resolved by any presumption."

¹⁰⁵322 N.E.2d 730 (Ind. Ct. App. 1975).

¹⁰⁶*Id.* at 732, *citing* *Bryarly v. State*, 232 Ind. 47, 111 N.E.2d 277 (1953).

¹⁰⁷The two exceptions are a deletion in the Indiana rule of the citation to the federal declaratory judgment statute and the addition of the sentence: "Declaratory relief shall be allowed even though a property right is not involved." IND. R. TR. P. 57.

¹⁰⁸*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

¹⁰⁹221 Ind. 44, 46 N.E.2d 237 (1943). *Kroger* held that equity cannot restrain criminal prosecutions or the operation of criminal statutes, although injunctive relief would not be denied if there was a property right at stake and the operation of the criminal statute was only incidental thereto. *Id.* at 46, 46 N.E.2d at 238.

State.¹¹⁰ Thus it would seem clear that as a result of this decision, the availability of declaratory relief is considerably expanded in Indiana.

The court of appeals reviewed the standards applicable to a motion for judgment on the evidence¹¹¹ in *Huff v. Traveler's Indemnity Co.*¹¹² The case involved a suit for damages based on a homeowner's insurance policy. After the jury returned a verdict for the plaintiff, the defendant filed a Trial Rule 59 motion to correct errors, which included a motion for judgment on the evidence pursuant to Trial Rule 50(A)(4). The trial court granted the motion and entered judgment for the defendant.

In affirming the trial court, the court of appeals distinguished the standard of review which should be applied by the trial court under Trial Rule 50 before the verdict from that which should be applied after the verdict. Before the jury's verdict, the settled rule is that the trial court should not grant a motion for judgment on the evidence unless it finds a total absence of evidence or reasonable inference from the evidence on one or more essential elements of the nonmoving party's case.¹¹³ After the verdict has been rendered, a further consideration by the trial court is required, as the Trial Rule 59 "clearly erroneous as contrary to or not supported by the evidence" standard of review goes a step beyond the Trial Rule 50 "clearly erroneous as contrary to the evidence because the evidence is insufficient to support it" standard of review."¹¹⁴ If, after the verdict, the trial court finds that there is substantial evidence of probative value on each essential element of the claim or defense, the court must weigh the evidence to see if the jury's verdict is against the weight of the evidence. If it is, the court must grant a new trial. Of course, if there is insufficient evidence to support the verdict, the court must enter judgment for the moving party, the same as it would have done before the verdict.

In *Lake Mortgage Co. v. Federal National Mortgage Association*,¹¹⁵ the supreme court gave a definitive interpretation to Trial Rule 59. The plaintiff filed a complaint of foreclosure against real estate owned by two defendants and in possession of two other

¹¹⁰232 Ind. 47, 111 N.E.2d 277 (1953). The court of appeals in *Weinburg* took note that it was not overruling the specific holding of the *Bryarly* case that a defendant, after receiving an adverse decision on a motion to quash the charge against him, cannot bring an action for a declaratory judgment to have the court again pass on the constitutionality of a statute. 322 N.E.2d at 735 n.3.

¹¹¹IND. R. TR. P. 50(A).

¹¹²328 N.E.2d 430 (Ind. Ct. App. 1975).

¹¹³See, e.g., *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974).

¹¹⁴328 N.E.2d at 433.

¹¹⁵321 N.E.2d 556 (Ind. 1975).

defendants. A receiver was appointed for the property, and the receiver was named in a third party complaint. Lake Mortgage Company, the receiver's employer and the local servicing agent on the plaintiff's mortgages, was also named as a third party defendant. Various cross-claims were filed among all the parties. After the jury returned a verdict, the trial court granted a new trial because, due to the number of claims and cross-claims, the jury may have been confused by the complexity of the issues. The court of appeals affirmed, holding that the trial court's action in granting a new trial was accorded a strong presumption of correctness.¹¹⁶

The supreme court reversed, holding that the presumption of correctness obtains only when the trial court grants a new trial because the verdict is against the preponderance of the evidence and supports its decision with special findings of fact.¹¹⁷ The court also held that the language "prejudicial or harmful error" found in Trial Rule 59(E) is not an "overbroad substantive category which shelters any reason advanced by a trial court in support of relief granted. The words 'prejudicial or harmful error' in [Trial Rule] 59(E) merely refer to the grounds for relief specified in [Trial Rule] 59(A)."¹¹⁸ Finally, the court held that when a trial court grants relief on its own motion,¹¹⁹ it must support its decision with a statement of facts and grounds upon which its decision is based, as required by Trial Rule 59(B). Otherwise, the party aggrieved by the court's action would not be able to properly formulate his appeal.

In *Pinkston v. State*¹²⁰ the court of appeals held that Trial Rule 41(B) was applicable to a criminal trial. The rule permits a motion for involuntary dismissal in nonjury trials. The motion is based upon the plaintiff's failure of proof and is made at the close of plaintiff's case-in-chief. In this case the trial court denied defendant's motion, and the defendant elected to proceed with the presentation of her evidence. By proceeding, the defendant waived any error in the ruling on the motion.¹²¹

¹¹⁶Ernst v. Schmal, 308 N.E.2d 732 (Ind. Ct. App. 1974).

¹¹⁷321 N.E.2d at 560. Trial Rule 59(E) (7) requires that when a new trial is granted because the verdict is not in accord with the evidence "the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted."

¹¹⁸321 N.E.2d at 560.

¹¹⁹IND. R. TR. P. 59(A).

¹²⁰325 N.E.2d 497 (Ind. Ct. App. 1975).

¹²¹See *Hoosier Ins. Co. v. Ogle*, 150 Ind. App. 590, 276 N.E.2d 876 (1971).

E. Appeals

*Greyhound Lines, Inc. v. Vanover*¹²² is a leading decision on the appeal of interlocutory orders, especially because it concerned the appeal of an order entered in a dispute over discovery. The trial court overruled the defendant's objections to the plaintiff's request for production of documents. The defendant then filed an assignment of error in the court of appeals, praying that the court reverse the trial court's order. The gist of the defendant's petition was that the request for production and the ruling of the trial court were contrary to the scope of discovery allowed by Trial Rule 26(B) (1) and (2), and hence the trial court could not order the production of the items requested without evidence of good cause being shown. The court of appeals, holding that the defendant was seeking review of a nonappealable order, sustained the plaintiff's motion to dismiss the appeal. The court said that the interlocutory appeal provisions were to be strictly construed and that any attempt to perfect an appeal which the rules do not authorize requires a dismissal. Hence, orders which are entered in discovery disputes will not be appealable as interlocutory orders, except upon one condition discussed below.

In Indiana, there are two bases for an appeal of an interlocutory order: Indiana Code section 34-5-1-1 Rule 72(b)¹²³ and Appellate Rule 4(B). The former was enacted by the General Assembly but was not dealt with by the Indiana Supreme Court when it adopted the Trial and Appellate Rules of Procedure. It authorizes an appeal to the supreme court of interlocutory orders for substantially the same grounds as those listed in Appellate Rule 4.¹²⁴ In addition, the statute states that an interlocutory order is appealable if the trial court certifies and the court on appeal or a judge thereof finds any of the following: (1) The appellant will suffer substantial expense, damage, or injury if the order is erroneous and the determination thereof is withheld until after judgment; (2) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or (3) the remedy by appeal after judgment is otherwise inadequate.

¹²²311 N.E.2d 632 (Ind. Ct. App. 1974).

¹²³See IND. CODE § 34-5-1-1 (Burns 1973). The statute can be found as a note to Appellate Rule 4 in the Court Rules volume of Burns Code edition.

¹²⁴Appellate Rule 4(B), unlike the statute, authorizes an appeal for the appointment of receivers. It also adds the words "not otherwise authorized to be taken to the Supreme Court" in the provision allowing appeals from orders and judgments upon writs of habeas corpus. IND. R. APP. P. 4(B) (4):

*Richards v. Crown Point Community School Corp.*¹²⁵ was the first case to comment on the effect on the statute of the adoption of the Rules of Appellate Procedure. The case reached the supreme court on an attempted appeal of an order granting a partial summary judgment. The court held that the order constituted a final judgment and, therefore, was not appealable as an interlocutory order. The court noted that its failure to deal with Rule 72(b) was an inadvertent omission and that it should be considered a part of the statutory provisions relating to appeals to the supreme court. Therefore, after the *Richards* decision, Rule 72(b) appeared to present an avenue of appeal to the supreme court not found in Appellate Rule 4(B). This distinction was removed, however, in *Sekerez v. Board of Sanitary Commissioners*,¹²⁶ in which the supreme court held that all interlocutory appeals were to be taken to the court of appeals. The supreme court thus overruled in part its decision in *Richards* without specific reference to it.

In summary, then, the following observations are applicable to interlocutory appeals:

- (1) All interlocutory appeals are to be taken to the Indiana Court of Appeals.
- (2) There are two provisions for interlocutory appeals. The first and latest is Appellate Rule 4(B). The other was enacted by the General Assembly and adopted in the *Richards* decision.
- (3) The two provisions are almost identical except for the certification language which is found in the statute but not in the appellate rule.
- (4) Discovery orders are interlocutory and not appealable because they do not come within the strictly construed language of Appellate Rule 4(B).
- (5) Interlocutory discovery orders can be appealed if the certification language of the statute is followed and allowed.

Two recent cases have dealt with the appealability of decisions on motions for summary judgment. In *Pitts v. Wooldridge*¹²⁷ an appeal was taken from an order denying the defendant's motion for summary judgment. Defendant filed a motion to correct errors directed to that order, which the trial court overruled. The defendant appealed, and plaintiff moved to dismiss the appeal on the ground that a denial of a motion for summary judgment was neither a final judgment nor an appealable interlocutory order. The court of appeals agreed with the plaintiff. It held that an

¹²⁵256 Ind. 347, 269 N.E.2d 5 (1971).

¹²⁶304 N.E.2d 533 (Ind. 1973).

¹²⁷315 N.E.2d 736 (Ind. Ct. App. 1974).

order denying a motion for summary judgment is not an appealable interlocutory order as defined pursuant to prior supreme court decisions.¹²⁸ The denial of a summary judgment motion indicates that there are issues of fact to be resolved by a trial; therefore, denial of the motion is interlocutory in character.

*Federal Insurance Co. v. Liberty Mutual Insurance Co.*¹²⁹ presented slightly different issues. Suit was brought by the plaintiff for damages on a bond. After the issues were joined and some discovery was had, the plaintiff filed a motion for summary judgment as to all issues of liability but reserved the issues of damages. The trial court granted the plaintiff's motion and denied a similar motion made by the defendant. The defendant then took an appeal, which the court of appeals dismissed. It held, relying on Trial Rule 56(C), that when summary judgment is rendered upon less than all of the issues or claims in the case, then judgment upon less than all the issues involved shall be interlocutory unless the trial court in writing expressly determines that there is no just reason for delay, and, in writing, expressly directs the entry of judgment as to less than all issues, claims, or parties. The court noted that such an entry had not been made, and, accordingly, the trial court's entry was regarded as interlocutory and not appealable as a final judgment.¹³⁰

The degree of specificity required in a motion to correct errors to preserve an issue for appeal was considered in *Leist v. Auto Owners Insurance Co.*¹³¹ The insurance company filed a complaint for a declaratory judgment and an injunction seeking to restrain Leist from pursuing arbitration of his claim against the company. The trial court granted the injunction and found that Leist was entitled to recover \$10,000 under an automobile insurance policy. However, the court further found that the insurance company was entitled to a right of subrogation for \$11,976.12 paid to Leist under a workmen's compensation policy. The insurance company had issued both policies to Leist's employer. Leist's motion to correct errors recited that the decision of the trial court regarding the right to subrogation was contrary to law.

On appeal the insurance company contended that Leist had not preserved the issue of the legality of a setoff clause in the insurance policy in his motion to correct errors and thus could not argue it on appeal. The court of appeals rejected this argument,

¹²⁸See *Anthrop v. Tippecanoe School Corp.*, 257 Ind. 578, 277 N.E.2d 169 (1972); *Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 269 N.E.2d 5 (1971).

¹²⁹319 N.E.2d 171 (Ind. Ct. App. 1974).

¹³⁰*Cf. Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 269 N.E.2d 5 (1971).

¹³¹311 N.E.2d 828 (Ind. Ct. App. 1974).

holding that Leist's motion was sufficiently specific to preserve the issue. The court stated that, in ascertaining whether an alleged error has been preserved, it is necessary to look also at the supporting memorandum to the motion to correct errors. If both the motion and supporting memorandum, considered together, substantially comply with the Trial Rule 59(B) requirement of specificity, the issue has been preserved for appeal. To consider only the motion itself, the court stated, "would inject a rigidity not contemplated by the framers of the Rules."¹³² The court noted that the issues of subrogation and setoff were closely related, that Leist appeared to have used the words interchangeably, and that the supporting memorandum specifically referred to setoff. Thus there was no waiver of the issue.

In *Hubbard v. State*,¹³³ a criminal appeal, the State did not argue the merits on five out of six issues presented in the defendant's brief. The State instead argued, relying on Appellate Rule 8.3(A) (7), that the defendant had waived these issues because of his failure to cite authorities in support of his contentions.¹³⁴ The supreme court chastised the State for not meeting the merits, stating that Appellate Rule 8.3(A) (7) is not a technicality to be used to preclude a party from raising a novel issue or from suggesting a reconsideration of a settled rule of law. The function of the rule is to secure a convenient and uniform mode for presentation of issues to an appellate court. The court held that the issues before it were clearly presented, and it proceeded to consider them.

In *Collins v. Dunifon*¹³⁵ the plaintiff attempted to rely on his own incompetence as justification for tolling the statute of limitations. He filed seven affidavits in support of his position in opposition to the defendant's motion for summary judgment. The trial court granted the defendant's motion, and the plaintiff filed a motion to correct errors, attaching with it an eighth affidavit—one not filed in opposition to the motion for summary judgment. The court of appeals held that the eighth affidavit was not properly before it. The court recognized that Trial Rule 59(D) does provide a basis for filing affidavits with a motion to correct errors,¹³⁶ but it held that this rule cannot be used as a basis for

¹³²*Id.* at 833.

¹³³313 N.E.2d 346 (Ind. 1974).

¹³⁴Appellate Rule 8.3(A) (7) provides in part: "The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities, statutes, and parts of the record relied upon"

¹³⁵323 N.E.2d 264 (Ind. Ct. App. 1975).

¹³⁶Trial Rule 59(D) provides that "[w]hen a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion."

presentation of evidence which the party neglected to present at a prior proceeding.¹³⁷ Rather, Trial Rule 59(D) "provides a basis for disclosing on the record matters constituting a basis for correction of error which occurred during the prior proceedings, but were not reflected in the record."¹³⁸ The court then reversed the grant of summary judgment because the remaining seven affidavits did create a genuine factual issue of plaintiff's alleged unsoundness of mind.

In a number of cases decided this year the courts have made it clear that a motion to correct errors must follow the last judgment of the trial court in order to perfect an appeal. In the first case of this type to arise this year, *Wyss v. Wyss*,¹³⁹ the trial court sustained the defendant's motion for summary judgment and entered judgment for the defendants. Thereafter, the plaintiffs moved to correct error. After a hearing on the motion, the trial court took the motion under advisement. Subsequently, the court entered its findings of fact and overruled the motion to correct errors. The court of appeals observed that, in comparing the findings of the original judgment with those in the ruling on the motion to correct errors, it was readily apparent that the trial court amended its original findings in the new entry. The court held that it therefore was necessary to file a second motion to correct errors directed against the entry which the trial court made as a result of the first motion to correct errors. As no second motion was filed, the court dismissed the appeal.

In *Hansbrough v. Indiana Revenue Board*,¹⁴⁰ the defendant board filed a motion to dismiss contending that Hansbrough failed to state a claim upon which relief could be granted.¹⁴¹ The trial court sustained the motion, and the plaintiff timely filed a motion to correct errors. The trial court overruled the motion to correct errors and in so doing made findings of fact and conclusions of law. No motion to correct errors was filed to the later decision. The court of appeals, sua sponte, dismissed the appeal for lack of appellate jurisdiction. It held that the later findings constituted the entry that finally determined the rights of the parties, leaving no further questions for future determination by the court. As such, it was the court's final judgment to which a motion to correct errors should have been directed. Judge Sullivan concurred, stating that the later entry was not a judgment at all but was merely

¹³⁷There was no showing in *Collins* that the affidavit was newly discovered evidence which could not have been discovered in time for the prior proceeding. See IND. R. TR. P. 59(A) (6).

¹³⁸323 N.E.2d at 268.

¹³⁹311 N.E.2d 621 (Ind. Ct. App. 1974).

¹⁴⁰326 N.E.2d 599 (Ind. Ct. App. 1975).

¹⁴¹IND. R. TR. P. 12(B) (6).

a ruling on a motion to dismiss. Such a ruling cannot be a judgment since the pleadings can be amended once as a matter of right within 10 days after service of notice of the court's ruling.¹⁴² In Judge Sullivan's opinion, had Hansbrough filed a motion to correct errors to the later entry, it still would not have been appealable.

In *Koziol v. Lake County Plan Commission*,¹⁴³ the court of appeals again dismissed an appeal in which a required second motion to correct errors was not filed. In this case findings of fact and conclusions of law and a judgment thereon were entered in the trial court. Thereafter, the appellants filed a motion to correct errors. The trial court overruled the motion and, in so doing, made new and additional findings of fact and conclusions of law. Appellants filed their praecipe and perfected their appeal on the basis of their prior motion. The court of appeals dismissed the appeal on the appellee's motion. It pointed out that, consistent with several recent decisions,¹⁴⁴ when the trial court modifies or changes the prior entry against which a motion to correct errors was directed, the appellant must file a second motion to correct errors prior to taking the appeal.

*Weber v. Penn-Harris-Madison School Corp.*¹⁴⁵ involved not only new findings by the trial court but also a vacating of its earlier judgment. The court of appeals held that with the vacating of the prior judgment, the motion to correct errors became a nullity; therefore, since a condition precedent to appeal had not been fulfilled, the court sustained appellee's motion to dismiss. *Easley v. Williams*¹⁴⁶ was a similar case with dissimilar results. A jury verdict was returned for the defendants, and judgment was entered accordingly. Thereafter, the plaintiff filed a motion to correct errors setting out several specifications of error. The court granted the motion and entered an order granting a new trial; no new judgment was entered. The defendant appealed from the order granting a new trial. The plaintiff filed a motion to dismiss the appeal, alleging that the trial court's ruling on the motion to correct errors constituted a new judgment which required that a second motion to correct errors be filed. The court of appeals denied the motion, holding that the trial court's grant of a new trial abolished the original judgment and that no new judgment resulted. Consequently, no new motion to correct errors was re-

¹⁴²IND. R. TR. P. 12(B) (8).

¹⁴³315 N.E.2d 374 (Ind. Ct. App. 1974).

¹⁴⁴See *State v. Kushner*, 312 N.E.2d 523 (Ind. Ct. App. 1974); *Wyss v. Wyss*, 311 N.E.2d 621 (Ind. Ct. App. 1974); *Davis v. Davis*, 306 N.E.2d 377 (Ind. Ct. App. 1974).

¹⁴⁵317 N.E.2d 811 (Ind. Ct. App. 1974).

¹⁴⁶314 N.E.2d 105 (Ind. Ct. App. 1974).

quired. The court deemed the grant of a new trial to be a final judgment from which an appeal could be taken pursuant to Appellate Rule 4(A). The court relied on the statement of Justice Arterburn in *State v. DePrez*¹⁴⁷ that the simple grant of a motion to correct errors is a final judgment from which an appeal can be taken without further ado.

Easley is the only case subsequent to *DePrez* which relieved a party from the requirement of filing a second motion to correct errors after the original judgment had been modified to any extent by the trial court. Notwithstanding the *Easley* court's reliance on *DePrez*, it is difficult to reconcile the two cases. If one of the purposes of the motion to correct errors is to allow the trial court an opportunity to rectify its mistakes, then the losing party on the trial court's grant of a new trial should be required to file a motion to correct errors to allow the court a chance to correct its mistake in granting the new trial. The theory behind *DePrez* was that if the court modifies its original judgment, it should be given the chance to correct any error in that modification before an appeal is taken.

In *Jackson v. Jackson*¹⁴⁸ and *State ex rel. Jackson v. Owen Circuit Court*,¹⁴⁹ appeals were taken in which the sufficiency of the evidence to support a trial court's determination was questioned. In both cases, however, the transcript of evidence and the proceedings at trial were not filed with the clerk of the trial court and made a part of the record. After the record of the proceedings and the appellant's brief were filed, the appellee moved to affirm the judgment of the trial court. The appellee argued that because the transcript was not filed, it was not properly before the court of appeals. The appellant then sought an order from the trial court making a *nunc pro tunc* entry of the trial court's certificate ordering the filing of the transcript of evidence. This was granted by the trial court in April, with a *nunc pro tunc* entry as of January 1974. The court of appeals held that the order of the trial court should be expunged from the record of the trial court since that court no longer had sufficient jurisdiction to make such an entry absent a written note, minute, or memorial in the record upon which to base the order. In short, when the record of proceedings was filed in the appellate court, jurisdiction of the case immediately passed to the appellate court. Since all questions raised in the appeal depended on a consideration of the evidence and since the evidence was not part of the record, there was nothing for the court of appeals to consider.

¹⁴⁷296 N.E.2d 120, 124 (Ind. 1973).

¹⁴⁸314 N.E.2d 70 (Ind. Ct. App. 1974).

¹⁴⁹314 N.E.2d 73 (Ind. Ct. App. 1974).

A number of cases in the last year dealt with the question of what constitutes an adequate appellate brief. In *City of Indianapolis v. Festival Theater Corp.*,¹⁵⁰ the appellee filed a motion to dismiss the appeal asserting that the appellant's brief did not contain a verbatim statement of the trial court's judgment. The court found that the allegations were true. However, the court stated that the defect was not a cause for dismissal but rather a cause for deferment. The court of appeals gave the appellants 10 days from the date of the order to amend their briefs to include a verbatim statement of the judgment; if they did not do so within that time, the judgment of the trial court would be affirmed.

In *Yerkes v. Washington Manufacturing Co.*,¹⁵¹ the plaintiff was employed by the defendant as a distributor of the company's goods. The defendants caused a criminal action to be brought against the plaintiff for the felony of falsely and fraudulently issuing a check to defendants. However, on the date of trial, the State dismissed the charge. Thereafter, the plaintiff initiated this action seeking damages on the theory of malicious prosecution. The defendants counterclaimed seeking judgment for the amount alleged to be due and owing by the plaintiff to the defendant company. Prior to trial, the court granted the defendants' motion for summary judgment on the plaintiff's claim and entered judgment for the defendants. Further, the court granted the defendants' motion for judgment by default on their counterclaim. Following a hearing on the issue of damages, the court entered judgment against the plaintiff and in favor of the defendants in the sum of \$2,497.90. Plaintiff's motion to correct errors was overruled. On appeal, plaintiff's brief failed to specifically set forth the applicable errors assigned in his motion to correct errors but rather made numerical reference to the appropriate sections of his motion. The defendants moved for dismissal, alleging that this violation of Appellate Rule 8.3(A)(7) amounted to a waiver of all these issues. The court of appeals, in overruling the defendants' motion, stated that it "prefers to decide cases on their merits whenever possible, and where a brief is in substantial compliance with the rules, waiver of error will not result from the failure to include all that [Appellate Rule 8.3] technically requires."¹⁵²

In *Chicago South Shore & South Bend Railroad v. Brown*,¹⁵³ the appellant petitioned for a rehearing. The petition included the assertion that the court of appeal's opinion failed to give a statement in writing upon each substantial question which arose in the

¹⁵⁰317 N.E.2d 463 (Ind. Ct. App. 1974).

¹⁵¹326 N.E.2d 629 (Ind. Ct. App. 1975).

¹⁵²*Id.* at 631.

¹⁵³323 N.E.2d 681 (Ind. Ct. App. 1975).

record. In considering the assertion, the court of appeals discussed Appellate Rule 11(B)(2), noting that four elements must be present for a rehearing to be granted: (1) A substantial question; (2) the appearance of the question both on the record and in the argument on appeal; (3) a petition setting forth portions of the record affirmatively establishing (1) and (2); and (4) a showing in the petition of prejudice resulting from the court's failure to give a statement in writing upon the question. The court then stated that the appellant's failure to object to the instructions of the trial court judge not only waived any potential error but also resulted in a failure to satisfy the "substantial question" element. Thus, it was unnecessary to order a rehearing.

In *Marshall v. Reeves*,¹⁵⁴ the appellant obtained a reversal of the trial court decision granting custody to the father. On transfer to the supreme court, the trial court was upheld. Subsequently, a motion to tax costs on appeal was filed. The motion included a request for attorney fees and discretionary damages. The supreme court, after noting that Appellate Rule 15(G), which concerns the costs of appeal, does not contain a right to attorney fees, went on to discuss the viability of Appellate Rule 15(F).¹⁵⁵ The court stated that a discretionary award of damages is proper where the appeal is frivolous or without substance or merit. The damages serve as a curb for frivolous appeals. Here, since the court of appeals and one of the supreme court justices felt that the appeal had merit, the appeal was not frivolous. In dicta the court restated the holding of *Vandalia Railroad Co. v. Walsh*¹⁵⁶ that a penalty may be assessed where an appeal is taken merely to harass or delay.

In *J.M. Foster Co. v. Northern Indiana Public Service Co.*,¹⁵⁷ the defendant appealed from the overruling of his amended objection to the taking of property by eminent domain. The same order also condemned to the use of the plaintiff an easement and right-of-way through defendant's property and appointed appraisers to determine its value. The defendant filed a motion to correct errors to that order and subsequently filed an assignment of errors in the court of appeals. The court of appeals held that the filing of an assignment of errors was the proper procedure to be followed on an appeal from an order overruling objections to condemnation. The order is by statute an interlocutory order¹⁵⁸ to

¹⁵⁴316 N.E.2d 828 (Ind. 1974).

¹⁵⁵Appellate Rule 15(F) allows a discretionary award of damages against the appellant if the judgment is affirmed. The damages cannot exceed 10% of a money judgment.

¹⁵⁶44 Ind. App. 297, 89 N.E. 320 (1909).

¹⁵⁷326 N.E.2d 584 (Ind. Ct. App. 1975).

¹⁵⁸IND. CODE § 32-11-1-5 (Burns 1973).

which no motion to correct errors need be filed.¹⁵⁹ The court also noted that the sustaining of objections to condemnation by a trial court is by statute¹⁶⁰ a final judgment, to which a motion to correct errors must be directed.

In *Berry v. State*¹⁶¹ the court of appeals discussed extensively the question of whether a change in the law would be retroactively applied. In a previous case Berry had taken an appeal in which part of the alleged error was the correctness of a jury instruction on the burden of producing evidence to show sanity at the time the offense was committed.¹⁶² In upholding Berry's conviction, the court held that the instruction given was not reversible error. Four years later the supreme court in another case overruled the *Berry* decision, holding that the jury instruction given in *Berry* was reversible error.¹⁶³ Berry then applied for post-conviction relief on the basis of the later decision. The trial court denied Berry's petition.

The question on appeal was whether the later decision would be retroactively applied to Berry. The court of appeals set out a three-pronged test by which retroactivity is determined: (1) The purpose of the new rule of law, (2) reliance on the old rule by the courts for authority, and (3) the effect of retroactive application on the system of criminal justice.¹⁶⁴ In discussing these criteria, the court pointed out that the tests have a rather intense practical application. The court stated that the reliance aspect is examined by attempting to determine whether law enforcement officers, as well as the judicial system, have relied on the operational finality of the old rule. The same type of approach was made by the court in determining the purpose of the new rule, and then in ascertaining whether applying it retroactively would operate to correct a prior infringement of an individual's freedom. Although this decision arose in a criminal context, the same type of analysis would clearly be applicable across the entire spectrum of the law.

¹⁵⁹Trial Rule 59(G) provides in part that "[a] motion to correct errors shall not be required in the case of appeals from interlocutory orders"

¹⁶⁰IND. CODE § 32-11-1-5 (Burns 1973).

¹⁶¹321 N.E.2d 207 (Ind. Ct. App. 1974).

¹⁶²*Berry v. State*, 251 Ind. 494, 242 N.E.2d 355 (1968).

¹⁶³*Young v. State*, 258 Ind. 246, 280 N.E.2d 595 (1972).

¹⁶⁴The court stated that these criteria come from two cases in the United States Supreme Court. *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). The criteria are known as the *Linkletter-Tehan* test.

V. Constitutional Law

*William A. Stanmeyer**

A. Equal Protection

With a heightened consciousness to the potential of success inherent in characterizing complained-of action as a violation of one's constitutional rights, litigants continue to show rare semantic ingenuity in their efforts to bring their case under such broad rubrics as "due process" or "equal protection." The diversity of cases which gives rise, in some sense, to these generic phrases, is as extensive as the list of items one may purchase in a supermarket. Some illustrations will add flesh and blood to this skeletal observation.

In *Indiana High School Athletic Association v. Raike*,¹ the Second District Court of Appeals upheld the trial court's judgment that the Indiana High School Athletic Association (IHSAA) and the Rushville Consolidated School Corporation rules prohibiting married students from participating in athletics violate the equal protection clause of both the United States and Indiana Constitutions. Jerry W. Raike, a 17-year-old senior in good standing at Rushville High School, married in November 1971. Consequently, the school prevented him from continuing on the baseball and wrestling teams,² citing the school's own rule, which stated: "Married students, or those who have been married, are in school chiefly to meet academic needs and they will be disqualified from participating in extra-curricular activities . . . except Commencement and Baccalaureate;"³ and the IHSAA rule, which stated: "Students who are or have been at any time married are not eligible for participating in intraschool athletic competition."⁴ The purposes of the rules were to "encourage wholesome amateur athletics,"⁵ and the justifications for the rules included the following: Married students need time to discharge

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¹329 N.E.2d 66 (Ind. Ct. App. 1975).

²Raike married during the month of November after he was already on the baseball and wrestling teams.

³329 N.E.2d at 69-70.

⁴*Id.* at 70.

⁵*Id.*

economic and family responsibilities; teenage marriages should be discouraged; athletes serve as models or heroes to other students, yet teenage marriages are usually the result of pregnancy, and thus the presence of married students in athletics would encourage immorality (presumably from heightened publicity of the person's private life); there would be discipline, training, and administrative problems; and there would be unwholesome interaction between married and nonmarried students unless undesirable "locker room talk" were avoided.⁶ Raike claimed that the rules impaired the fundamental right to marry, that no compelling state interest was shown, and that the rules failed to satisfy even the rational basis test of constitutionality.

The court provided a useful discussion of the standards of review appropriate for equal protection cases. The "low" tier or low scrutiny test presumes the constitutionality of the classification and will not disturb it absent a showing of "no rational relationship" to a legitimate governmental interest.⁷ The "high" tier or high scrutiny test, at the opposite end of the scale, inspects the classifying criteria to ascertain whether they are grounded upon certain "suspect traits,"⁸ such as race or national origin, or whether the classification impinges upon rights deemed "fundamental," such as the right to vote, travel, or associate freely.⁹ If so, then "strict" scrutiny will strike the statute down unless justified by a compelling governmental interest.¹⁰ These abstract polarities have been somewhat fused in recent years with the introduction of a more flexible hybrid approach,¹¹ wherein the clas-

⁶*Id.*

⁷*Id.*

⁸For examples of cases employing a high scrutiny test based upon a suspect class see *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (national origin); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin).

⁹For example of cases employing a high scrutiny test based upon fundamental rights see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (freedom of association); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to vote); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *United States v. Guest*, 383 U.S. 745 (1966) (interstate travel); *Griswold v. Connecticut*, 381 U.S. 479 (1964) (freedom of association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1957) (freedom of association); *Griffin v. Illinois*, 351 U.S. 12 (1956) (the right to appeal a criminal conviction).

¹⁰See Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661, 665 (1973).

¹¹The *Raike* court describes this new approach as being based upon a "multi-factor, sliding scale" analysis with the two end points of the scale being the traditional two tiers of high and low scrutiny. 329 N.E.2d at 73. See Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving*

sification must be justified by something more than any “reasonably conceivable” set of facts. Rather, there must be a fair and substantial relation to the object of the legislation. Here, the more important and closer the individual’s interest comes to a specific constitutional guarantee, the greater the degree of judicial scrutiny.

In applying these norms the court first acknowledged that a “suspect” classification was not involved.¹² It then struggled with the question whether a “fundamental right” was at stake. After quickly disposing of the question whether high school students have a fundamental right to participate in school athletics and other extra-curricular activities, the court determined that despite dicta in many Supreme Court cases, the right to marry also is not conclusively recognized as a fundamental right.¹³ Nonetheless, the court found both the right to marry and to participate in athletics important enough that it applied the intermediate standard.¹⁴ It noted that in the name of promoting a wholesome atmosphere, the school would prohibit all married students from participating in nonacademic school affairs. Upon applying the intermediate standard, the court found the classification to be over-inclusive in that it included some married students of good moral character and under-inclusive in that it omitted unmarried students whose immoral conduct was as likely to be a corrupting influence as that of married high school students.¹⁵ Metaphorically, “the classification simultaneously catches too many fish in the same net and allows others to escape.”¹⁶ And this is true even though there may be some rational basis or connection between the classification and the object sought to be obtained.

In *Vaughan v. Vaughan*,¹⁷ the First District Court of Appeals considered a suit by a grandfather on behalf of his 4-year-old grandson against the child’s parents to recover for head injuries sustained by the child when he was struck by a falling tombstone during a cemetery visit with his parents. The circuit court dismissed the action. On appeal, the appellate court held that parents are immune from liability for any torts committed against their

Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

¹²329 N.E.2d at 73.

¹³Although there is no conclusive United States Supreme Court holding that the right to marry is a fundamental right, it has been termed to be a penumbra of the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1964).

¹⁴329 N.E.2d at 75.

¹⁵*Id.* at 77. See Stroud, *supra* note 10, at 663-64.

¹⁶329 N.E.2d at 75.

¹⁷316 N.E.2d 455 (Ind. Ct. App. 1974).

unemancipated minor child and that the grant of parental immunity has a rational basis and thus does not violate the child's constitutional rights. In a brief opinion, which does not expressly spell out the inequality complained of, Judge Robertson, for the court, observed that "[t]he equal protection guarantees of both the state and federal constitutions do not prohibit all classifications. It is only demanded that the classification be reasonable and not arbitrary."¹⁸ Judge Robertson continued by noting that there are good reasons for granting the immunity: "Unity of interest of parent and child, no truly adversary situation, difficulty of dissolving the relationship and prevention of family discord We cannot, therefore, say the grant of immunity is arbitrary and without rational basis as a matter of law."¹⁹ It appears the thrust of the equal protection attack was that case law did not treat the plaintiff equally in that it permitted pursuit of a remedy where negligence by third parties, or by parents towards emancipated children who had attained majority, allegedly caused harm, but refused a remedy where parents negligently injured their unemancipated children. Thus, one child could have been harmed by a third party, and the other suffer identical harm from his parent; the former would have a remedy, the latter would not. In the view of the court, though, persons may be classified differently if there are "legitimate reasons" and the classification has a "rational basis."²⁰

The equal protection theme arose in a different context in *Heminger v. Police Commission*,²¹ in which members of the Police Department of the city of Fort Wayne, Indiana, challenged the constitutionality as applied to them of a statutory scheme for a police merit system in certain second-class cities.²² The Third District Court of Appeals, affirming the trial court, held first that the requirement that seniority comprise 40 percent of the promotion rating of personnel was not violative of equal protection;²³ secondly, that although the statute was applicable to only one city it was not void as a prohibited special law;²⁴ and finally, that the challenged provisions of the statute were not unconstitutionally vague and ambiguous if given the interpretation placed on them by the police commission.²⁵

¹⁸*Id.* at 457.

¹⁹*Id.*

²⁰*Id.*

²¹314 N.E.2d 827 (Ind. Ct. App. 1974).

²²See IND. CODE §§ 19-1-20-1 to -8 (Burns 1974).

²³314 N.E.2d at 833.

²⁴*Id.* at 836.

²⁵*Id.* at 838.

At the threshold of its opinion, the court noted the strong presumption favoring the constitutionality of legislative action. It then observed that

appellants do not purport to come within the reach of a classification currently considered to possess an inherently suspect quality; nor do they contend that the classification in question impinges upon a fundamental right. As a consequence, the defendants-appellees are not required to demonstrate a compelling State interest or a *necessary* relationship between the classification and such interest.²⁶

It follows in turn, then, that the court did not have to apply the stricter standard of review, which permits no inequality. The lower standard of review, employed by the court, only requires that the legislation be reasonable and not arbitrary.

The equal protection clause of the United States Constitution precludes the States from enacting legislation "which accords dissimilar [*sic*] treatment to persons placed by statute into separate classes on the basis of criteria which bear no relation to the purpose or objective of the statute."²⁷ The United States Supreme Court set forth the standard as follows:

But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.²⁸

Applying this reasonableness standard to the statutory scheme involved, the *Heminger* court found that the instantaneous application of a pure merit system would have a "potentially chaotic effect" upon the continuity of command. Consequently, the established seniority system was not arbitrary and was not without a rational basis.²⁹

A related issue in *Heminger* raised the question whether the retirement scheme violated article 4, sections 22 and 23 of the Indiana Constitution, which provide in pertinent part that the Indiana legislature shall not pass a local or special law where a

²⁶*Id.* at 831 (emphasis by the court).

²⁷*Id.* at 832.

²⁸F.S. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), *quoted in* 314 N.E.2d at 832. *Royster Guano* was an early case dealing with reasonable classifications. The Court, over the dissents of Justices Brandeis and Holmes, held that a state law which taxed all the income of local corporations derived from outside the state and which aided no local business was arbitrary and thus violated the equal protection clause of the fourteenth amendment.

²⁹314 N.E.2d at 833.

general law can be made applicable.³⁰ The plaintiff asserted that the present statute applied only to the city of Fort Wayne, that the other cities of the second class in the state with police merit statutes applicable to them did not have provisions according seniority a weight upwards of 40 percent, and that no Indiana city has a mandatory retirement age as early as 60. It was argued that neither the city of Fort Wayne nor the personnel of the police department have unique characteristics justifying different treatment.

While acknowledging that under the Indiana Code's definition of second class cities³¹ only the city of Fort Wayne is clearly isolated and identified by its operation as a second class city, the court declared that this fact alone does not evidence the special legislation that the Indiana Constitution forbids.³² The court purported to distinguish cases where similar legislation was held unconstitutional as special legislation³³ and concluded that "we are not confronted with a classification on the basis of population differences which are so slight as to render the Act completely arbitrary."³⁴ There is found here "a rational relationship between population and legislation controlling the employment and promotion of police personnel."³⁵

In many equal protection cases, the plaintiff's underlying rationale is that his situation is identical to that of someone else who is receiving better—"unequal"—treatment. The defendant's rebuttal may be either to claim that the other person or class is not receiving any better treatment or to admit that he is receiving better treatment, but to show that the differences are marginal, are based on real differences in the situation, or are justified by broader concerns serving the overall ends of justice.

³⁰IND. CONST. art. 4, § 22 begins: "The General Assembly shall not pass local or special laws, in any of the following enumerated cases" Section 23 continues: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

³¹IND. CODE § 19-1-20-1 (Burns 1974) provides:

This chapter [19-1-20-1—19-1-20-8] shall apply to any city of the second class having a population in excess of one hundred seventy-six thousand [176,000] and located in a county having a population of not less than two hundred eighty thousand [280,000] nor more than four hundred fifty thousand [450,000] according to the last preceding United States census.

³²314 N.E.2d at 834-35.

³³The court cited the following cases: *Rosencranz v. City of Evansville*, 194 Ind. 499, 143 N.E. 593 (1924); *School City v. Hayes*, 162 Ind. 193, 70 N.E. 134 (1904).

³⁴314 N.E.2d at 836.

³⁵*Id.*

In *Martin v. State*³⁶ the defendants' Marion County conviction of first degree murder had been affirmed on appeal by the Indiana Supreme Court. On petition for rehearing, the supreme court held that the statute granting lone defendants ten peremptory challenges and granting co-defendants as a group the same total of ten peremptory challenges, which they had to exercise collectively, did not violate equal protection. The court noted that the Indiana Code did indeed define two classes of defendants, those tried alone and those tried jointly, and that the Code gives each class ten challenges.³⁷ The court observed that "if a statute should create and define several classes and dissimilarly assign burdens or benefits of the same type between the classes,"³⁸ the statute does not necessarily violate equal protection, since a reasonable basis for the dissimilarity may support statutory constitutionality. "[W]hen rights and burdens are being parcelled out to groups comprised of different numbers of persons, the individual in each such group is not necessarily entitled to identical treatment."³⁹

The court acknowledged that the class to which appellant belonged, identified as comprised of multiple defendants facing a joint jury trial, "is set aside and separately treated from the class of lone defendants;"⁴⁰ but it found that the reasonable purpose of limiting peremptory challenges is both to maintain a workable level of challenges and to bring the influence of prosecution and defense into balance. The court also noted that the right of peremptory challenge is not a fundamental right, but merely statutory;⁴¹ and if in a given case some prejudice flows toward a co-defendant in a joint trial, he has the right to seek severance.⁴²

³⁶317 N.E.2d 430 (Ind. 1974).

³⁷IND. CODE § 35-1-30-2 (Burns 1975) provides:

In prosecutions for capital offenses, the defendant may challenge, peremptorily, twenty [20] jurors; in prosecutions for offenses punishable by imprisonment in the state prison, ten [10] jurors; in other prosecutions, three [3] jurors. When several defendants are tried together, they must join in their challenges.

³⁸317 N.E.2d at 431.

³⁹*Id.*, citing *Dandridge v. Williams*, 397 U.S. 471 (1970). In *Dandridge* the Maryland Aid to Dependent Children program was upheld, despite "sliding-scale" need standards which provided disproportionately less support to large families than small ones. The United States Supreme Court held that, at least in the area of economics and social welfare legislation, as long as there is some reasonable basis, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. *Martin* did not discuss whether *Dandridge* can be distinguished from the principal case because of difference of subject matter—jury selection in a criminal case versus receipt of a civil welfare benefit.

⁴⁰317 N.E.2d at 432.

⁴¹*Id.* at 431.

⁴²*Id.* at 432.

B. Due Process

In *Indiana State Employees Association, Inc. v. Boehning*,⁴³ the question was the extent to which due process requirements protect a state employee's claim of right to continued employment. Plaintiff Phyllis Musgrave was hired by the Indiana State Highway Commission (ISHC) as a stockroom clerk in January 1970 and in February 1973 was notified that her employment would be terminated. Her request for a hearing was denied. Defendant commissioner of the ISHC claimed that she was terminated for cause. Musgrave stipulated that her political affiliation was not an issue.⁴⁴ She challenged the state action on due process grounds, but the United States District Court for the Southern District of Indiana⁴⁵ held that it would abstain "until the Indiana courts have had an opportunity to consider the applicability of and authoritatively construe the Bi-Partisan Personnel System Act⁴⁶ and/or the Administrative Adjudication and Court Review Act⁴⁷ in determining whether employees of the Indiana State Highway Commission have a right to a pre-discharge hearing under Indiana law."⁴⁸

The Seventh Circuit Court of Appeals reversed the decision to abstain and reached the merits. The court observed that the Indiana Administrative Adjudication and Court Review Act does not apply, since it does not authorize or direct a hearing when dismissal is for cause or political affiliation. Thus this case did not present an issue unclear under state law. Abstention, the court said, is warranted in such "special circumstances" as, possibly, where a state statute alleged to be unconstitutional could be construed by a state court as eliminating the constitutional question or when an attack on the defendant's act is made under both state and federal law and a definitive ruling on the state issue would resolve the controversy. But here, the court discerned no such substantial question as to applicable state law.⁴⁹ If the court were permitted to abstain, it would result in an impermissible requirement of exhaustion of state remedies. Furthermore, abstention is inappropriate where, as here, "[t]he right to a hearing under the federal constitution is the question presented in this ac-

⁴³511 F.2d 835 (7th Cir. 1975).

⁴⁴*Id.* at 837-38.

⁴⁵357 F. Supp. 1374 (S.D. Ind. 1973).

⁴⁶IND. CODE §§ 8-13-1.5-1 *et seq.* (Burns 1973).

⁴⁷*Id.* §§ 4-22-1-1 *et seq.* (Burns 1973).

⁴⁸357 F. Supp. at 1378.

⁴⁹*Id.*

tion, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court.”⁵⁰

Turning to the merits, the court addressed the question of entitlement. Quoting *Board of Regents v. Roth*⁵¹ to the effect that “[p]roperty interests . . . are not created by the Constitution [but] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits,”⁵² the court concluded that the ISHC Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment on the part of employees in plaintiff’s position. The reason is that “[t]he specification of authority to discharge for two types of grounds . . . clearly implies exclusion of other grounds.”⁵³ It follows that the employee cannot be dismissed arbitrarily. The further result is that officials must provide a hearing at the request of the party dismissed where he can be “informed of the grounds for his nonretention and challenge their sufficiency.”⁵⁴

Another case dealing with a due process issue was *T.A. Moynahan Properties, Inc. v. Lancaster Village Cooperative, Inc.*⁵⁵ Here a property management corporation sued the cooperative housing project and the Department of Housing and Urban Development (HUD) to enjoin the latter from terminating its con-

⁵⁰511 F.2d at 837.

⁵¹408 U.S. 564 (1972). *Roth* involved the nonrenewal of a college professor’s one-year teaching contract. The Supreme Court held that no hearing was required by the fourteenth amendment for “renewal of a nontenured state teacher’s contract” unless the teacher can show a “property interest” in the employment or some deprivation of “liberty.” The *Roth* Court held that under the facts the lower court erred in granting summary judgment. Since no stigma had been attached which could preclude future employment, the respondent could not point to any property interest or deprivation of liberty.

⁵²511 F.2d at 837, quoting from *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁵³511 F.2d at 838.

⁵⁴*Id.* at 837, quoting from *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, the respondent had worked in the Texas state college system for ten years under one-year contracts. The regents refused to continue his employment and provided no prior hearing or reasons for their action. The respondent brought an action alleging violation of free speech and of his fourteenth amendment procedural due process rights. The Supreme Court held that lack of tenure did not of itself defeat respondent’s free speech and procedural due process claims. The Court noted that although an “expectancy” of continued employment did not constitute the requisite property right to invoke the fourteenth amendment, the existence of the system’s de facto tenure policy was a sufficient basis to require the college to grant respondent a hearing.

⁵⁵496 F.2d 1114 (7th Cir. 1974).

tract to manage the project. On November 9, 1970, Lancaster and Moynahan signed an agreement on a Federal Housing Authority (FHA) form under which Moynahan was appointed Lancaster's managing agent; one of the agreement's cancellation provisions permitted the FHA, HUD's predecessor, or the mortgagee to cancel the agreement on 30-days' written notice "with or without cause." Upon receipt of a timely notice of cancellation in April 1972, which stated that Lancaster had requested HUD to exercise its termination right, Moynahan wrote to HUD asking permission to "appeal" and requesting it to express its position verbally and give an explanation for the termination. HUD refused this request.⁵⁶

Although permitting cancellation "with or without cause," the agreement's cancellation clause was limited by case law: it could not be completely whimsical or motivated solely by disapproval of the contractor's religion or politics.⁵⁷ Cancellation also could be challenged for fraud or such gross mistake as necessarily implied bad faith⁵⁸ or by demonstrating no rational basis for the decision.

The court held that the substantive due process standard for valid action under the cancellation provision was fulfilled. The government had both a financial and proprietary interest in the project's successful operation. Further, the reason for the termination given by HUD's representative, that long-standing disputes between the parties jeopardized the project's continuing success, was not arbitrary or capricious.⁵⁹ However, the procedural due process standard was not met. Citing *Board of Regents v. Roth*,⁶⁰ the court concluded that Moynahan had a property interest in an agreement which was of benefit to it and which had a fixed term even though subject to the contingency of cancellation by a third party.⁶¹ The nature of the required notice and hearing, the

⁵⁶*Id.* at 1116.

⁵⁷See *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). In *Cafeteria Workers* the Court held that the fourteenth amendment had no application where a cook was summarily excluded from working at a private food concession on the grounds of a naval gun factory. The concessionaire's contract had provided that the security officer could forbid employment of anyone who failed to meet security standards.

⁵⁸See *United States v. Wunderlich*, 342 U.S. 98 (1951). *Wunderlich* involved the meaning of a "finality clause" in a government contract. The Court held that in a standard form government contract, providing that disputes are to be decided by department heads and that their decisions can be set aside by the Court of Claims only upon a finding of fraud, fraud means "an intention to cheat or be dishonest." Further, a finding of gross error or capriciousness does not justify setting aside the department head's decision.

⁵⁹496 F.2d at 1117.

⁶⁰408 U.S. 564 (1972). See note 51 *supra*.

⁶¹496 F.2d at 1118.

court said, was a written statement by HUD of the reasons for the proposed action and an opportunity for Moynahan to present material which challenged the supposed facts and the rationality of the stated reasons for the action. Through procedures prior to this appeal, Moynahan had just such notice and opportunity to be heard; thus, the deficiencies in the notice of cancellation were cured.⁶² Over the dissent of Judge Sprecher,⁶³ the court reversed the judgment of the district court insofar as it declared the cancellation of the instant agreement a nullity; but, insofar as it enjoined HUD from terminating similar agreements without following the above-stated minimal due process requirements, the lower court's judgment was affirmed.⁶⁴

An interesting "state action" assertion was rejected in *Phillips v. Money*,⁶⁵ an action for damages and injunctive relief brought as a class action under the Civil Rights Act,⁶⁶ claiming that certain lien laws of Indiana were unconstitutional. Phillips had an altercation with Money, a service station owner, over the allegedly negligent repair work Money had done on Phillips' car. Relying on several Indiana mechanics' lien laws,⁶⁷ Money refused to return the car unless paid an additional \$50 for evaluation of a continuing mechanical problem. Plaintiffs claimed that these Indiana statutes⁶⁸ "encouraged and authorized" Money to detain the auto. They claimed that though Money was in business for himself, he was acting under color of state law for the purpose of 42 U.S.C. § 1983⁶⁹ in detaining the auto and thus depriving the plaintiffs of the use of their property without due process, since the owners were not afforded notice and hearing to resolve the dispute over the legitimacy of the charge.

The Seventh Circuit Court of Appeals affirmed the dismissal of the action by the District Court for the Southern District of Indiana, holding that the detention by a private individual in possession of an automobile pursuant to a common law or statutory mechanic's lien does not constitute "state action." The court rejected the theory that the state had delegated an essentially

⁶²For discussions of the nature and type of notice and hearing required to afford due process see *Bell v. Burson*, 402 U.S. 535 (1971), and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁶³496 F.2d at 1119 (Sprecher, J., dissenting). Judge Sprecher's dissent expressed the view that there was "no authority for crippling the power of the government to exercise a range of discretion consonant with contractual rights freely bargained with private contractors." *Id.*

⁶⁴*Id.* at 1118-19.

⁶⁵503 F.2d 990 (7th Cir. 1974).

⁶⁶42 U.S.C. § 1983 (1970).

⁶⁷IND. CODE § 9-9-5-6 (Burns 1973); *id.* §§ 32-8-31-1, -3, -5 (Burns 1973).

⁶⁸*Id.*

⁶⁹42 U.S.C. § 1983 (1970).

public or governmental function to the garageman or that he acted as an alter ego of a state agent with semblance of state authority. The court relied primarily on *Moose Lodge No. 107 v. Irvis*,⁷⁰ which confined state action to those situations of private discrimination where the state has been "significantly involved." The court then distinguished *Shelley v. Kraemer*,⁷¹ *Burton v. Wilmington Parking Authority*,⁷² and other cases where the private individual and state officials were symbiotically related. Moreover, this was not a situation where the state had delegated an essentially public or governmental function to the mechanic.

The court was also unpersuaded by plaintiffs' argument that the mechanic's refusal to redeliver the auto constituted a sub rosa exercise of the police power. To the contention that "the Indiana statutory and common law scheme affirmatively supports the garageman's action by insulating him from criminal and civil liability,"⁷³ and that accordingly the private party "derives some 'aid, comfort or incentive,' either real or apparent, from the state,"⁷⁴ the court answered that the question is to be resolved by a balancing process. The court summarily balanced the factors, with *Burton* in mind, and concluded that plaintiffs' attack was not against affirmative state support but against the mere "legal context in which individuals conduct their private affairs."⁷⁵

⁷⁰407 U.S. 163 (1972). In *Moose Lodge*, the appellee, a black guest of a member of the appellant, a private club, was denied service at the club's dining room on the basis of his race. The Court held that the Pennsylvania liquor license regulatory scheme did not implicate the state in the licensee's guest practices sufficiently to bring the act of discrimination within "state action" for the equal protection clause where the state's regulatory system is not intended to encourage discrimination. *Id.* at 171-77.

⁷¹334 U.S. 1 (1948). In *Shelley* the Court held that private restrictive covenants designed to exclude designated minority members from residential areas do not per se violate the fourteenth amendment equal protection clause, but state court enforcement of such covenants does violate the clause. *Id.* at 22.

⁷²365 U.S. 715 (1961). In *Burton* the Supreme Court held that the State of Delaware was a "joint participant" in the operation of a restaurant which was located in a publicly-owned parking facility built with and maintained by federal funds; therefore, when the restaurant refused to serve appellant because of his race, the State was responsible, in part, for violation of the fourteenth amendment equal protection clause. Also, the Court stated that where such a lease of public property is entered into, the lessee must comply with the fourteenth amendment's proscriptions as if they were binding covenants in the lease.

⁷³503 F.2d at 993.

⁷⁴*Id.*

⁷⁵*Id.* at 994 (footnote omitted).

It should be clear that plaintiffs' assertion that the state had delegated an essential state function to private parties was tenuous in the extreme, and if seriously meant could only betray a complete lack of understanding of political theory. More tenable was plaintiffs' theory that the "context" of laws complained of affirmatively supported the garageman's actions. For it might be argued that the statutory law, at least, amounted to a placing of the weight of state authority behind the self-help action of a private individual, for example, detaining another private person's property pending the outcome of a dispute. However, the plaintiffs' position would have been more convincing had the garageman been accorded the right to take the owner's car away from him, rather than merely continue to hold what was already voluntarily placed in his possession. While the court's disposition of the case seems sensible enough, especially in light of the interests to be protected between two contending private persons—the relatively immobile mechanic, whose place of business can readily be found and who generally can easily be reached by legal process, versus the often highly nomadic auto owner—"state action" remains a spacious concept, one at times amorphous enough to admit of some surprising applications.

A different form of government action, that of designating rights to a share of a state-provided pension fund for police officers, was the issue in *Ballard v. Board of Trustees*.⁷⁶ Here, a retired city policeman brought an action for restoration of his policeman's pension, which had been terminated after his felony conviction. The First District Court of Appeals reversed the trial court's judgment for the defendant.⁷⁷ The Indiana Supreme Court reversed the judgment of the appellate court and reinstated that of the trial court. The statute in question authorized the termination of pension benefits upon conviction of a felony.⁷⁸ The appellate

⁷⁶324 N.E.2d 813 (Ind. 1975).

⁷⁷313 N.E.2d 351 (Ind. Ct. App. 1974).

⁷⁸IND. CODE § 19-1-24-5 (Burns 1974) provides:

Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payment that might otherwise accrue thereafter. Provided, however, that nothing contained in this act . . . shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony or shall have become an habitual drunkard.

court had found the statutory provision unconstitutional as violative of article 1, section 30 of the Indiana Constitution which provides: "No conviction shall work corruption of blood, or forfeiture of estate." The appellate court relied heavily on the Washington case of *Leonard v. City of Seattle*⁷⁹ which reasoned that once the pension rights had vested, they were no different from any other kind of property and therefore could not be divested in the face of a constitutional provision against forfeiture of estate.

The supreme court rejected this argument, observing that pensions under a state compulsory contribution plan like the police pension fund have traditionally been considered gratuities of the sovereign which involve no agreement of the parties and thus create no contractual rights.⁸⁰ The court disagreed with the lower court's view that statutory reservations could not be imposed: "In the instant case there were several statutory reservations, one of which was that Appellant not become convicted of a felony. Appellant's interest was subject to and conditioned by the terms of the legislation which created his interest at the time he took . . . it in the first place."⁸¹ The court noted that wide latitude must be given reasonable legislative policy, which here provided for a method of deterring criminal acts on the part of those who might be recalled into police service and which sought to support the morale of both the general public and the state's active police forces. Ballard took the employment subject to the legislature's public policy conditions; consequently, he had a vested right subject to divestment upon a condition subsequent, namely, conviction of a felony. "Appellant's 'estate' consisted of only those pension payments due him so long as he was not a convicted felon."⁸² Moreover, an analysis of the historical notion of "forfeiture of estate" reveals that a pension payment, like a fine, was not an "estate" in the common law sense. Strictly speaking, the statute under review does not provide for a forfeiture, since it was not automatic but lay in the board's discretion.⁸³

C. The First Amendment

The first amendment guarantee of freedom of speech received court attention in the libel and slander case of *American Broadcasting Cos. v. Smith Cabinet Manufacturing Co.*,⁸⁴ in which

⁷⁹81 Wash. 2d 479, 503 P.2d 741 (1972).

⁸⁰324 N.E.2d at 816.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.* at 817, citing *Commonwealth v. Avery*, 77 Ky. 625, 29 Am. R. 429 (1879).

⁸⁴312 N.E.2d 85 (Ind. Ct. App. 1974). Defendant-appellant, American Broadcasting Companies, Inc., is a national television and radio broadcast-

a crib manufacturer sought an injunction and damages against the showing of a television documentary which allegedly inaccurately demonstrated the combustibility of a baby crib. The material, prepared for a documentary entitled "ABC News Close-Up—On Fire!," included a film segment which depicted a hand holding a lighted match against the bottom rail of one of plaintiff's model cribs. The crib caught fire within 10 seconds, a preliminary to the whole bed's being consumed within 10 minutes. After a publicity screening of the documentary, the crib company sought an injunction and damages for claimed loss of sales. The crib company alleged inaccuracy in that the program condensed a 10-minute test into a 40-second period, which made the burning of the crib appear more rapid than it was in fact, and in that the test was not run under sufficiently realistic conditions since the crib did not contain a mattress or bedclothing.

A hearing was held three days before the scheduled public showing of the documentary to determine whether the film was false and libelous and thus enjoinable. The trial court, after viewing the films in question (a film of one who tested the plaintiff's crib and a clip used in promotional advertising), issued a carefully drawn preliminary injunction directed only to those films the court personally had viewed and ABC had previously published. The order was in the alternative and would have permitted ABC to run the news documentary on the condition that the 40-second segment showing the burning of the plaintiff's baby bed include written notices designating the elapsed time sequence of the fire test of their product.⁸⁵ The order further required that ABC edit the documentary by eliminating any reference to the plaintiff or its product by name, pending a more thorough and comparative testing and documentation, to be followed by a further order of the trial court. If ABC refused to edit the documentary as ordered, it was prohibited from showing the documentary if it included the segment in question. The trial court also found that the film segment in question was knowingly false and misleading, a finding undisturbed on appeal and one from which the manufacturer argued that actual malice had been found.⁸⁶

Viewing the case as simply falling under the broad rubric of prior restraint of freedom of speech, the First District Court of Appeals cited *Near v. Minnesota*,⁸⁷ *New York Times Co. v. Sulli-*

ing company which has various affiliates, including a local television station at Evansville, Indiana.

⁸⁵312 N.E.2d at 87.

⁸⁶*Id.*

⁸⁷283 U.S. 697 (1931).

van,⁸⁸ and *Rosenbloom v. Metromedia, Inc.*⁸⁹ for the proposition that libelous statements on matters of public interest cannot be subjected to prior restraint but are matters for damages in an action at law.⁹⁰ The court concluded that the truth or falsity of the television segment is of no consequence in making a decision on the permissibility of prior restraint. "In other words, an injunction is not permitted simply because the publication will be false."⁹¹ The court went on to demonstrate that flammability of children's cribs is indeed a matter of public interest and that the standards for broadcast journalism do not differ from those for other media in such a way as to affect the outcome of this case.

Although the court consistently repeated the position that "it [is] immaterial whether the statements in question [are] true or false,"⁹² it sensed the potential for "abuse of the constitutional privilege." The court stated that in the past year these abuses have been "even more widespread than has been the case in the past."⁹³ Because it saw the policy alternatives as polarities between a "legal system that allows the opportunity for abuse" and "a legal system which would permit the censorship of free speech,"⁹⁴ the court did not attend to the philosophical incongruity of putting falsehood on the same plane as truth or to the practical rights of the public (here, those viewing the documentary) not to be deceived by the knowing presentation of false material. While the court's reading of precedent is correct, at least one of the policy goals its opinion claims to subserve might better have been reached by just the opposite holding: Namely, the production of a "wise decision" by the public through letting "the people . . . decide whether statements were true or false."⁹⁵ The trial court's careful effort to add written notices stating the elapsed time sequence of the fire test and to prevent naming the plaintiff or its product pending further tests would have provided untutored viewers with more facts on which to base their ultimate decision on the quality

⁸⁸376 U.S. 254 (1964).

⁸⁹403 U.S. 29 (1971). In *Rosenbloom* the Court held that damages could not be recovered in a libel action involving public officials on matters of public interest unless actual malice was shown to exist.

⁹⁰312 N.E.2d at 91. See Note, *Temporary Injunctions in Libel Cases*, 25 BAYLOR L. REV. 527 (1973); Note, *Broadcast Journalism: The Conflict Between the First Amendment and Liability for Defamation*, 39 BROOKLYN L. REV. 426 (1972); Note, *The New York Times Rule: An Analysis of Its Application*, 55 MINN. L. REV. 299 (1970); 40 FORDHAM L. REV. 651 (1972).

⁹¹312 N.E.2d at 89.

⁹²*Id.* at 91, citing *Robinson v. American Broadcasting Co.*, 441 F.2d 1396 (6th Cir. 1971).

⁹³312 N.E.2d at 91.

⁹⁴*Id.*

⁹⁵*Id.* at 90.

of plaintiff's products. To that extent, the trial judge's position, though doubtless a prior restraint, would have better promoted the cause of abstract truth and the formation of educated public opinion.

A libel and slander case dealing with a much different matter was *Perry v. Columbia Broadcasting System, Inc.*⁹⁶ Mr. Lincoln T. Perry, whose stage name is Stepin Fetchit, sued CBS and its program sponsor because of segments in the first of seven telecasts entitled "Of Black America," shown locally in Indianapolis on WISH-TV, dealing with the history, culture, and experience of blacks in the United States.⁹⁷ The complained of section showed some of Perry's films with the narrator commenting that Perry made \$2 million popularizing the "lazy, stupid, chicken-stealing idiot" character. Perry argued that the defendants "without plaintiff's permission or consent to use either his real name or take parts out of context, intentionally violated [his] right of privacy and maliciously depicted [him] as a tool of the white man who betrayed the members of his race and earned two million dollars portraying Negroes as inferior human beings."⁹⁸ In affirming the district court, the Seventh Circuit Court of Appeals rejected Perry's contention that there was an invasion of his privacy, since by his own admission on deposition he was "a household word" or a public figure in the 1930's. The court also rejected his contention that he was no longer a public figure, since he was still active in show business. The court also agreed that the issue of the treatment of blacks in American movies was of public interest and that there was no showing of actual malice or reckless disregard of the truth on the part of the telecast's producers.⁹⁹

This is a rather straightforward case except for its unrealized potential for enlightenment on "the question whether a lapse of time will restore a public figure to the status of a private citizen."¹⁰⁰ With the decision that Perry was still a public figure because of continuing activity in the entertainment industry, the court felt it could pretermitt this question.¹⁰¹

⁹⁶499 F.2d 797 (7th Cir. 1974).

⁹⁷Perry, an Illinois resident, brought the suit against the Columbia Broadcasting System, Xerox Corporation, and Twentieth Century-Fox Film Corporation, all incorporated in New York and doing business in Indiana, and the Indiana Broadcasting Corporation, an Indiana corporation which owned and operated WISH-TV, a television station in Indianapolis. The district court's jurisdiction was based on federal diversity jurisdiction. 28 U.S.C. § 1332 (1970).

⁹⁸499 F.2d at 799.

⁹⁹*Id.* at 801-02.

¹⁰⁰*Id.*

¹⁰¹Professor Prosser discusses the question as follows:

In *Jacob Weinberg News Agency, Inc. v. City of Marion*,¹⁰² an action was brought by a magazine wholesaler against the city of Marion and its enforcement officials seeking a judgment of unconstitutionality of the city ordinance limiting the display of pornography to adults. Specifically, the ordinance made it a misdemeanor (1) for anyone in charge of a store or retail outlet knowingly to permit a minor to enter the premises if pornographic materials were sold or displayed thereon and (2) for a minor knowingly so to enter or his parents to knowingly permit him to do so. The ordinance also required the merchant to have a sign visible from the outside which states: "Persons Under Age of Eighteen (18) Years Prohibited from Entering These Premises."¹⁰³ Plaintiff's theory was that the threat of prosecution of certain retailers under the ordinance had caused those retailers in turn to order the plaintiff to remove the publications from the store sales racks, curtailing his income from potential sales. This, it was asserted, deprived the plaintiff of his rights of property without due process of law. The trial court dismissed the action, adopting the city's theory that the plaintiff had no standing to bring the suit and that the ordinance did not restrict plaintiff's freedom of speech. The trial court premised dismissal on the assumption that Weinberg's only claim to standing was economic, that is, that the threat of ordinance enforcement had diminished the expected proceeds from sale of the magazines.¹⁰⁴

In reversing, the Second District Court of Appeals acknowledged that an economic interest of a manufacturer or wholesaler

One troublesome question, upon which none of the cases dealing with the Constitutional privilege has yet touched, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that one [*sic*] were news, can properly be a matter of present public interest. If it is only the event which is recalled, without the use of the plaintiff's name, there seems to be no doubt that even a great lapse of time does not destroy the privilege. Most of the common law decisions have held that even the addition of his name and likeness is not enough to lead to liability. There are, however, two or three decisions indicating that a point may be reached at which a past event is no longer news, and the unnecessary mention of the plaintiff's name in connection with it may afford a cause of action. Thus far none of the decisions dealing with the Constitution has afforded any clue as to whether such a limitation is possible.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 827-28 (4th ed. 1971) (footnotes omitted).

¹⁰²322 N.E.2d 730 (Ind. Ct. App. 1975).

¹⁰³*Id.* at 731.

¹⁰⁴*Id.* at 733.

of merchandise in maintaining a free retail market for his stock in trade may or may not be too remote to give him standing. Here, however, Weinberg's magazines "do convey thoughts (good or bad) by printed words and pictures. This attribute of his merchandise entitles his business to the qualified protection of the First Amendment" ¹⁰⁵ The court relied on *Bantam Books, Inc. v. Sullivan*, ¹⁰⁶ relying particularly on a footnote in *Bantam* in which Justice Brennan noted that appellants, even though they were publishers and not booksellers or writers, had standing to challenge the constitutionality of an anti-obscenity commission whose activity resulted in curtailment of its sales. ¹⁰⁷ The court buttressed its argument with a quotation from *Interstate Circuit, Inc. v. City of Dallas*: ¹⁰⁸ "Finally, appellant United Artists contends the ordinance unconstitutionally infringes upon its rights by not providing for participation by a distributor, who might wish to contest where an exhibitor would not. *Of course the distributor must be permitted to challenge the classification . . .*" ¹⁰⁹ The court later concluded that Weinberg "is suing *in behalf of himself* to protect *his own* claim to a First Amendment right to distribute magazines. . . . He is not . . . in the position of a mere proxy arguing the rights of his retailers; he is arguing his own claim that his own constitutional rights are infringed." ¹¹⁰ Therefore, under the Indiana Rules of Trial Procedure, ¹¹¹ the plaintiff was permitted to bring the action and the trial court's order of dismissal was improper.

While defensible on the narrow issue of standing, the case does have some troubling overtones. The passage cited from *Bantam* was dicta and the passage cited from *Interstate Circuit* was, at root, only a reiteration of the same dicta from *Bantam*. While it is quite possible that the United States Supreme Court would indeed hold that the plaintiff had standing, however indirect or derivative his asserted free speech rights might be, the reality of plaintiff's claim, whatever the texture of the constitutional cloak in which he wrapped himself, was objection to the loss of market for his product, which here happened to be pornography. It seems somewhat strained to argue that to restrict a wholesaler's poten-

¹⁰⁵*Id.* at 733-34.

¹⁰⁶372 U.S. 58 (1963). The *Bantam* case involved the constitutionality of creating a commission whose function was to advise booksellers.

¹⁰⁷322 N.E.2d at 734, *citing* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (dicta).

¹⁰⁸390 U.S. 676 (1968).

¹⁰⁹322 N.E.2d at 734, *quoting from* 390 U.S. at 690 (emphasis added by Indiana court).

¹¹⁰322 N.E.2d at 735 (emphasis in original).

¹¹¹IND. R. TR. P. 57.

tial market by excluding children thereby limits him from "speaking" his mind. The principle argued for by the plaintiff might apply as well to the movie-theater regulations excluding minors or minors-without-accompanying-adult, or the Federal Communication Commission "family hour" primetime policy of minimizing the incidence of sex and violence in television programming. Further, one must wonder, if the plaintiff was "speaking," what it was he was saying. "It has been well observed that [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" ¹¹²

For the distributor to characterize, as an illustration of his first amendment right of free speech, the commercial distribution of numerous publications he himself may not have read, is almost metaphorical. For insofar as the publications deal in any serious way with ideas, they might articulate views quite the contrary to those of the distributor. Such semantic license is not uncommon in areas as controversial and complicated as obscenity litigation, and, on balance, an ultimate determination on the substantive merits may well be better than dismissal on the threshold issue of standing. But the root lesson from the case may well be strategic: if counsel can persuade a court that his client should be allowed to wrap himself in someone else's first amendment cloak, he will be far better prepared to withstand the cold scrutiny of his business activities.

VI. Consumer Law

*Douglas J. Whaley**

During the survey period the major consumer law developments were statutory. The Congress was responsible for most of the activity, passing acts regulating sales warranties and credit billing and amending the Truth in Lending Act.

¹¹²Roth v. United States, 354 U.S. 476 (1957), *quoted with approval* in Miller v. California, 413 U.S. 1 (1973).

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A. *The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*¹

President Ford signed into law the Magnuson-Moss Act on January 4, 1975. The Act, which went into effect on July 4, 1975, applies only to products manufactured after that date.² It is divided into two nonrelated parts: Title I dealing with warranties, and Title II dealing with the jurisdiction and authority of the Federal Trade Commission (FTC). This article will discuss only Title I.

Generally, the Magnuson-Moss Act provides that for all products sold to consumers and covered by any *written* warranty,³ the written warranty must meet certain minimum FTC standards⁴ “so as not to mislead the reasonable, average consumer” if the product

¹The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C.A. §§ 2301-12 (Supp. 1, 1975).

²*Id.* § 2312(a). The FTC has declined, on the basis of lack of authority, to extend the Act's effective date. FED. TRADE COMM'N NEWS SUM. No. 24, at 3 (1975).

³A “written warranty” is defined as:

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C.A. § 2301(6) (Supp. 1, 1975).

⁴*Id.* § 3202(b) (1) (B). The Act provides the FTC with guidelines for the formulation of its supplementing rules, stating that the rules *may* require the inclusion of the following as part of the written warranty:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty,

costs the consumer more than \$5.⁵ In addition the warranty must be conspicuously designated as either a "full (statement of time

including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

Id. § 2302(a).

On July 15, 1975, the FTC issued three proposed rules. 40 Fed. Reg. 29,892-94 (1975). The proposed rules deal with (1) disclosure of written warranty terms, *id.* part 701 [hereinafter cited and referred to as Proposed Warranty Disclosure Rule]; (2) pre-sale availability of written warranty terms, *id.* part 702 [hereinafter cited and referred to as Proposed Pre-Sale Availability Rule]; and (3) informal dispute settlement procedures, *id.* part 703 [hereinafter cited and referred to as Proposed Settlement Procedures Rule]. The Proposed Warranty Disclosure Rule incorporates each term suggested by the Act, as listed above, with elaboration on some terms. Proposed Warranty Disclosure Rule, § 701.3. Subsection 701.3(l) represents the FTC's response to item (9) listed above. A warrantor, by the proposed rule, must re-print one of the following statements in his warranty:

This warranty gives you specific legal rights. You also have implied warranty rights. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

or

This warranty gives you specific legal rights. You also have implied warranty rights, including an implied warranty of merchantability, which means that your product must be fit for the ordinary purposes for which such goods are used. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

Subsection 701.3(h) allows the warrantor to provide either a step-by-step explanation of the procedure for obtaining performance of a warranty obligation or a toll-free telephone number which the consumer can use to ascertain such procedure. If terms such as "lifetime" are used to indicate the duration of a warranty, subsection 701.3(m) provides that there must be a "clear and conspicuous disclosure of the life referred to." It seems obvious that the prod-

duration) warranty” or a “limited warranty”⁶ if the product costs the consumer more than \$10.⁷ A “full (statement of time duration) warranty”—for example, a “full one year warranty” — must meet the minimum federal standards of the Magnuson-Moss Act⁸

uct life is the life referred to, but it may be that the FTC means to require more than this, possibly a specific minimum number of years.

The Proposed Warranty Disclosure Rule requires that warranties clearly disclose the purpose of cards which are to be returned by the consumer subsequent to purchase. If return of the card is a condition precedent to warranty coverage, this is to be clearly disclosed by the warrantor. *Id.* § 701.4. If the card's return is not required for coverage, its purpose must be disclosed. *Id.*

Given the objective of avoiding the misleading of consumers, subsection 2302(b) (1) (A) of the Act mandates that the FTC prescribe rules requiring that the terms of any written warranty be made available to the consumer prior to the sale of the product to him. The FTC has proposed such rules. Proposed Pre-Sale Availability Rule pt. 702. Under the proposed rule, it is the duty of the seller to maintain a binder, notebook, or similar system, in each department in which a consumer product which is warranted is sold. *Id.* § 702.3(a). Such binder must be entitled “WARRANTIES”, in boldface type on the outside cover, and it must be accompanied by the following statement: “You may obtain a copy of any of the warranties contained in this book from the warrantor.” *Id.* § 702.3(a) (1) (i). The seller is required to request copies of warranties from the warrantor, together with an index and periodic supplements. *Id.* §§ 702.3(a) (1) (ii), (2). Such binders must be made available to the consumer upon request. *Id.* § 702.3(a) (3). It is the duty of the warrantor to (1) provide sellers with copies of written warranties, *id.* § 702.3(b) (2); (2) provide a copy of any warranty requested by a consumer, *id.* § 702.3(b) (1); and (3) attach to the product and print on the package or container the following statements: “The retailer has a copy of the complete warranty on this product. Ask to see it.” *Id.* § 702.3(b) (3).

Under the proposed rule, any catalog seller must clearly and conspicuously disclose, on the same page as the description of the product, any warranty designation and the address at which a free copy of the written warranty may be obtained, and such a copy must be provided. *Id.* § 702.3(c). Similarly, any mail-order seller or anyone advertising with instructions to order is required to disclose in his solicitation any warranty designation and the address at which a free copy of any written warranty may be obtained, and such a copy must be provided upon request. *Id.* § 702.3(d). Door-to-door sellers are required to present the consumer with a copy of any written warranty prior to any sale's transaction, and the consumer may keep the copy even if no purchase was made. *Id.* § 702.3(e).

⁵Warranties provided by the manufacturer for products which actually cost the consumer \$5 or less need not comply with the rules governing contents of warranties. 15 U.S.C.A. § 2302(e) (Supp. 1, 1975).

⁶*Id.* § 2303(a).

⁷*Id.* § 2303(d).

⁸*Id.* § 2303(a). The statutory requirements for a “full” warranty are as follows:

- (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

and any FTC rules supplementing the Act. Any written warranty not meeting these minimum standards is deemed a "limited warranty" and must be "conspicuously designated" as such.⁹

The idea, of course, is that once consumers become aware of the difference between the two types of warranties, they will tend to buy products with the protections afforded by the "full" designation. Thus manufacturers which give only a "limited" warranty or give no written warranty at all¹⁰ will be at a competitive disadvantage.

The FTC, which has the duty of drawing up rules to supple-

(2) notwithstanding section 2308(b) of this title [allowing limitation of the duration of implied warranties; *see* note 13 *infra*], such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such products or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

Id. § 2304(a). As of the date of this writing, the FTC had not issued proposed rules regarding duties or categorization of duties inherent in section 2304(a), though it has that authority pursuant to section 2304(b) (3) of the Act.

⁹*Id.* § 2303(a) (2).

¹⁰A supplier can avoid the matter completely if he has given no written warranty and has effectively disclaimed the implied warranties in a manner consistent with sections 2-316(2) and 2-316(3) of the Uniform Commercial Code (UCC). *Cf.* *Woodruff v. Clark County Farm Bureau Cooperative*, 286 N.E.2d 188 (Ind. Ct. App. 1972) (implied warranty disclaimers are not favored in Indiana and must be clear and conspicuous or the warranty survives). If the implied UCC warranties were not effectively disclaimed, suit for their breach could be brought under the Magnuson-Moss Act, even though no written warranty was given. 15 U.S.C.A. § 2310(d) (Supp. 1, 1975). The advantage of a federal suit, as opposed to one under the UCC, is the recovery of attorneys' fees. *Id.* § 2310(d) (2).

ment the Magnuson-Moss Act,¹¹ cannot require the giving of a written warranty.¹² But if the supplier of the product does elect to give a written warranty, implied warranties created by state law may not be disclaimed.¹³ This constitutes a major development in the law of warranties. It reflects congressional belief that it is basically unfair for a manufacturer to give express warranties of limited effectiveness while at the same time disclaiming all implied warranties. For example, an automobile manufacturer gives a "warranty" that is effective only if the consumer returns the defective vehicle to the factory within five days of its purchase, but disclaims all implied warranties. If the vehicle self-destructs on the sixth day, the consumer is helpless. The Magnuson-Moss Act validates the consumer's usual belief—a belief wrong under prior law—that goods at the least are fit for their ordinary purpose.¹⁴

Under the Magnuson-Moss Act consumers injured by breach of a written warranty, an implied warranty, or a service contract may sue individually or as part of a class and may recover actual damages plus costs and reasonable attorneys' fees.¹⁵ There are, however, several prerequisites to suit. The consumer must give the

¹¹The FTC is required or allowed in provisions throughout the Magnuson-Moss Act to prescribe rules supplementing the Act. *See, e.g.*, 15 U.S.C.A. § 2302(b)(1)(A) (Supp. 1, 1975) (availability of terms to consumer); *id.* § 2303(c) (exemptions from designation of written warranties); *id.* § 2306(a) (manner and form for disclosure of terms and conditions of service contracts).

¹²"Nothing in this chapter . . . shall be deemed to authorize the Commission . . . to require that a consumer product or any of its components be warranted." *Id.* § 2302(b)(2).

¹³*Id.* § 2308(c). The implied warranties may, however, be limited in duration if a "full" warranty is not given. *Id.* § 2308(b). For example, if a manufacturer gave a "full 30 day" written warranty, he could not exclude the UCC implied warranties of merchantability or fitness for a particular purpose. UNIFORM COMMERCIAL CODE §§ 2-314, -315. These implied warranties would last for a reasonable time, which could exceed 30 days. If, on the other hand, a manufacturer gave only a "limited" written warranty, he could limit the duration of the implied warranties to the same duration as the written warranty, providing this limitation is conscionable and conspicuous. 15 U.S.C.A. § 2308(b) (Supp. 1, 1975).

¹⁴Fitness for an *ordinary* purpose is part of the UCC's implied warranty of merchantability found in section 2-314(2)(c); fitness for a *particular* purpose is an implied warranty described in UCC section 2-315. Other UCC implied warranties can arise from common understanding or past dealings between the parties. UNIFORM COMMERCIAL CODE § 2-314(3).

¹⁵15 U.S.C.A. § 2310(d)(2) (Supp. 1, 1975). The federal courts have jurisdiction only if the amount in controversy exceeds \$50,000, the amount in controversy for each plaintiff exceeds \$25, and there are at least 100 plaintiffs if it is a class action. *Id.* § 2310(d)(3)(B).

warrantor notice of the defect¹⁶ if the warranty is so conditioned. The consumer must allow the warrantor a reasonable opportunity to "cure" the defect.¹⁷ If the product proves to be a "lemon" and irreparable, this requirement is satisfied after a reasonable number of repair attempts.¹⁸ If the warrantor has established a fair informal settlement procedure, in compliance with FTC rules involving participation by independent or governmental agencies,¹⁹ and has made it clear as part of the written warranty that use of the

¹⁶*Id.* § 2304(b) (1). The UCC requires that notice always be given within a reasonable time after the breach of warranty should have been discovered or all UCC actions are barred. UNIFORM COMMERCIAL CODE § 2-607(3).

¹⁷15 U.S.C.A. § 2310(e) (Supp. 1, 1975). There is a similar requirement in the UCC. UNIFORM COMMERCIAL CODE § 2-508.

¹⁸15 U.S.C.A. § 2304(a) (4) (Supp. 1, 1975). Congress called this provision the "anti-lemon" rule. See H.R. REP. NO. 93-1606, 93d Cong., 2d Sess. 24 (1974).

¹⁹Section 2301(a) (2) of the Act directs the FTC to prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty. It does not specify form, procedures, or requirements which the FTC must prescribe. The FTC has responded by proposing a rule which would permit widely varying procedures, allowing warrantors to establish mechanisms best suited to their situation. Proposed Settlement Procedures Rule, pt. 703. The proposed rule includes detailed requirements for member (those deciding disputes) qualifications, deadlines for resolution of disputes, recordkeeping, and audits.

Any warrantor choosing to establish an informal dispute settlement mechanism must provide a statement of the availability of the mechanism, its name and address or telephone number, the type of information needed to resolve a dispute, and any time limits. *Id.* § 703.2. If a warrantor cannot resolve a dispute directly, it must immediately refer the problem to the mechanism, together with all required information, and must comply with any requirements of the mechanism to fairly and expeditiously resolve disputes. *Id.* §§ 703.2(e)-(h). The Proposed Settlement Procedures Rule provides that the mechanism should be funded and staffed in such a way as to provide fair resolution for all disputes and that it must be free to consumers. *Id.* § 703.3. Upon receipt of the dispute, the mechanism must notify the parties and provide them with a copy of operating procedures and time limits, *id.* § 703.5(b), and then must investigate the situation. *Id.* § 703.5(c). If a settlement is not reached, the mechanism must render a decision within 40 days of notice of the dispute, and the decision must include remedies deemed appropriate and allowance of a reasonable time for performance. *Id.* § 703.5(e). The decisions of the settlement mechanism are not legally binding, but the warrantor is required to act in good faith. *Id.* § 703.5(j).

The Proposed Settlement Procedures Rule requires that the mechanism maintain thorough records of each dispute, consisting of at least names and addresses of parties, the product involved, the basic facts, a statement of the decision, all evidence, and a statement of the warrantor's intended action. *Id.* § 703.6. The records must be kept for at least 4 years after the decision, and certain statistics must be compiled on such recorded disputes and kept. *Id.* §§ 703.6(c), -(d). These records must be available for required yearly

procedure is a prerequisite to suit, the consumer must seek redress first through the informal settlement procedure.²⁰ Finally, a consumer cannot sue unless the product can be returned free of liens and encumbrances²¹ and with no damage other than that caused by the warranty defects.²²

The Magnuson-Moss Act contains some other interesting measures. One section prohibits the use of a "tie-in," under which a warrantor attempts to condition his warranty on the use of other products or services provided by him;²³ another section provides for regulation of the terms of service contracts;²⁴ and a third section requires that the FTC develop rules concerning warranty practices in the sale of used motor vehicles.²⁵ The total impact of the Magnuson-Moss Act will remain unknown until the FTC promulgates additional rules necessary to implement many of the Act's provisions, but even without these rules, which likely will be pro-consumer in nature, the Magnuson-Moss Act already has forged a major link in the chain of federal statutes Congress has created in recent years to protect the consumer.²⁶

B. *The Fair Credit Billing Act*

Congress passed the Fair Credit Billing Act²⁷ at the same time

audits. *Id.* § 703.7. Statistics are to be available to any person, but specific records of disputes must be kept confidential. *Id.* § 703.8.

²⁰15 U.S.C.A. § 2310(a) (Supp. 1, 1975).

²¹*Id.* § 2304(b) (2).

²²*Id.* § 2304(c). The "failure to provide reasonable and necessary maintenance" is classified as an "unreasonable use," which also would allow the warrantor to avoid remedying a defect, malfunction, or failure of the warranted consumer product. *Id.*

²³*Id.* § 2302(c). The FTC may grant waivers of this rule in appropriate cases. *Id.*

²⁴*Id.* § 2306. This section allows the FTC to develop disclosure rules for service contracts. "Service contracts" are written contracts to perform repair or maintenance work on a consumer product for a specified period of time. *Id.* § 2301(8).

²⁵*Id.* § 2309(b).

²⁶*E.g.*, the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970), Regulation Z, 12 C.F.R. pt. 226 (1975); the Federal Garnishment Act, 15 U.S.C. §§ 1671-77 (1970); the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-20 (1970), 24 C.F.R. pts. 1700, -10, -15, -20 (1975); the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t (1970); the Federal Odometer Law, 15 U.S.C. §§ 1981-91 (Supp. II, 1972), 49 C.F.R. pt. 590 (1975); the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. II, 1972).

²⁷The Fair Credit Billing Act, 15 U.S.C.A. §§ 1601-08, 1610, 1631, 1632, 1637, 1666-66j (Supp. 1, 1975). The Federal Reserve Board, pursuant to the statute, has promulgated amendments to Regulation Z to implement sections 306 to 308 of the Act. §§ 226.1-14, 40 Fed. Reg. 19,489-95 (1975), *as revised* 40 Fed. Reg. 32,350-60 (1975) [hereinafter cited as Reg. Z].

as it passed minor amendments to the Truth in Lending Act²⁸ and enacted the Equal Credit Opportunity Act,²⁹ which prohibits sex discrimination in the granting of credit. All of these statutes went into effect on October 28, 1975. The Fair Credit Billing Act deals with several consumer credit problems left unresolved by prior statutes: (1) billing disputes, (2) bank setoffs, and (3) credit card practices.

1. Billing Disputes

Under the Fair Credit Billing Act, when a customer discovers an error in his charge account or credit card bill and provides written notification of the error to the creditor within 60 days of receipt of the bill, the creditor must acknowledge the complaint in writing within 30 days³⁰ and investigate and resolve the dispute within the lesser of two billing cycles or 90 days.³¹ In the interim the creditor may not take action to collect the disputed amount,³²

²⁸15 U.S.C. §§ 1601-65 (1970), as amended 15 U.S.C.A. (Supp. 1, 1975). The following comprise the more important amendments: New credit advertising disclosure requirements, 15 U.S.C.A. § 1665a (Supp. 1, 1975); a three year statute of limitations for the right of rescission when a security interest is taken in the consumer's home, *id.* § 1635(f); an expansion of the Act's regulation of credit cards, *id.* § 1644; a drastic change in the civil liability section to provide that the injured consumer may recover actual damages, punitive damages in the amount of double the finance charge (with a \$100 minimum and \$1,000 maximum), and costs and attorneys' fees, *id.* §§ 1640(a)-(c), (f)-(h). For the first time the Truth in Lending Act speaks directly to the conditions under which class actions may be allowed, stating, for instance, that the total recovery in a class action now may not be more than the lesser of \$100,000 or 1 percent of the net worth of the creditor-defendant. *Id.* § 1640(a)(2)(B).

²⁹The Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-91e (Supp. 1, 1975). The Federal Reserve Board is given the authority to regulate credit discrimination on the basis of sex, *id.* § 1691b, and has issued proposed regulations toward this end. See 40 Fed. Reg. 18,183-87 (1975). Consideration of the sex of the applicant in granting or denying credit is unlawful and gives rise to a civil action for actual damages, punitive damages of up to \$10,000, and costs, including reasonable attorneys' fees. 15 U.S.C.A. § 1691e (Supp. 1, 1975).

³⁰15 U.S.C.A. § 1666(a) (Supp. 1, 1975). If the creditor has so stipulated in the Fair Credit Billing Act disclosure form, which must be sent to all customers of the creditor semiannually, *id.* § 1637(a)(8), the customer must send a separate written complaint notice, rather than simply write the complaint on the bill's payment stub. *Id.* § 1666(a). Many creditors are likely to impose such a separate writing requirement if the returning payment stubs are routinely fed into a computer without examination.

³¹*Id.* § 1666(a)(3)(B).

³²*Id.* He may not sue, for instance, or close the account, or threaten any retaliatory action. Within limitations, however, the creditor is not prohibited from sending statements of account to the customer during that period. *Id.* § 1666(c).

impose a finance charge on it,³³ or include it in a credit report to a third party.³⁴ After making a good faith investigation,³⁵ the creditor may adjust the amount or not adjust it as he likes, but he must give the customer at least 10 more days in which to pay.³⁶ The creditor need not reinvestigate if the customer complains of the same problem.³⁷ But if the creditor thereafter gives a credit report on the matter to a third person, he must indicate in the report that the customer still disputes the charge and must notify the customer of the name and address of each party to whom the credit report was sent.³⁸ A creditor violating these provisions forfeits the amount in dispute not exceeding \$50.³⁹ He may also be liable for the usual Truth in Lending Act civil penalties.⁴⁰ The customer must be given semiannual notice of all these rights substantially in the form set forth by the Federal Reserve Board.⁴¹

If the creditor has agreed to give the customer a non-interest-bearing grace period in which to pay, the bill must be sent out at least 2 weeks before the date on which the finance charge begins to accrue.⁴² This should end the maddening experience of receiving on June 18 a bill that states it must be paid by June 15 to avoid the imposition of a finance charge. The creditor also may be required

³³Reg. Z, § 226.14(b) (1). If the dispute is resolved in his favor, however, the creditor may impose a finance charge or late payment charge to the extent of the amount actually owed. *Id.*

³⁴15 U.S.C.A. § 1666a(a) (Supp. 1, 1975). If the customer is permitting a bank to pay his credit card bills by automatically deducting the amount owed from his checking account, he may stop the disputed bill from being paid by giving the bank 16 days' written notice. Reg. Z, § 226.14(c) (1).

³⁵The creditor must make a written response to the customer's complaint explaining the statement and, if the customer so requests, documenting all charges. 15 U.S.C.A. § 1666(a) (3) (B) (Supp. 1, 1975). If the customer claims that he did not receive an item shown on the statement or that the merchant honoring the credit card made an incorrect report to the card issuer, the creditor must look into the matter and give the customer a written explanation of the investigatory steps taken. Reg. Z, § 226.14(a) (2) (iii).

³⁶Reg. Z, § 226.14(e) (1).

³⁷15 U.S.C.A. § 1666(a) (Supp. 1, 1975).

³⁸*Id.* § 1666a(b).

³⁹*Id.* § 1666(e).

⁴⁰*Id.* § 1640; Reg. Z, § 226.14(f) (2). See 12 U.S.C.A. § 1640 (Supp. 1, 1975), amending 12 U.S.C. § 1640 (1970). Section 1640 is discussed in note 28 *supra*.

⁴¹Reg. Z, § 226.7(d). The Federal Reserve Board has provided a model statement of notice, the text of which must substantially be contained in the notice form of the creditor. *Id.* § 226.7(a) (9). All bills must contain a new "Send Inquiries To:" statement. *Id.* § 226.7(b) (x).

⁴²15 U.S.C.A. § 1666b(a) (Supp. 1, 1975). But this requirement does not control if the creditor is prevented from timely mailing "because of an act of God, war, natural disaster, strike, or other excusable or justifiable cause, as determined under regulations of the Board." *Id.* § 1666b(b).

to credit all payments on the date of receipt so that the customer does not incur extra finance charges.⁴³ Merchants who honor bank credit cards must report to the card issuer all items returned within 5 business days of the return.⁴⁴

2. Bank Setoffs

In the latter part of the 18th century, there developed a common law lien by which a bank could, without notice, unilaterally debit the account of a depositor in order to pay a debt owed to the bank. This right, known to lawyers as "setoff" and to bankers as "offset,"⁴⁵ has often been used by a credit card issuing bank to dip into the checking account of a cardholder/depositor to settle credit card debts that the customer for some reason had refused to pay. The Fair Credit Billing Act now provides that a card issuer may not exercise the right of setoff in consumer credit transactions unless it has obtained a court order or it actually has contracted in writing with the customer to pay his credit card bills automatically on a regular basis.⁴⁶ Even then, in the event of a dispute, the customer can stop the setoff by giving the bank 16 days' written notice to that effect.⁴⁷

3. Credit Cards⁴⁸

The Fair Credit Billing Act deals with several disparate credit

⁴³Reg. Z, § 226.7(g). The creditor must credit the customer's account for any overpayment or refund the excess amount over the total new balance within 5 business days of receipt of payment. *Id.* § 226.7(h) (1).

⁴⁴*Id.* § 226.13(k) (1). The card issuer must then credit the account within 3 business days of the day the merchant's notice is received. *Id.* § 226.13(k) (2).

⁴⁵The bankers appear to have won this logomachy: the Fair Credit Billing Act calls it "offset." 15 U.S.C.A. § 1666h (Supp. 1, 1975). For pre-Act discussions of the common law lien see Note, *Banking Setoff: A Study in Commercial Obsolescence*, 23 HASTINGS L.J. 1585 (1972); Note, *Bank Credit Cards and the Right of Setoff*, 26 S.C.L. REV. 89 (1974).

⁴⁶15 U.S.C.A. § 1666h(a)(1) (Supp. 1, 1975); Reg. Z, § 226.13(j).

⁴⁷Reg. Z, § 226.14(c) (1). If the customer misses the 16-day notice requirement, he still may dispute the amount he believes to be in error within 60 days of mailing or delivery of the erroneous periodic statement. *Id.* § 226.14(c) (2).

⁴⁸The new amendments to the Truth in Lending Act provisions on credit cards, 15 U.S.C.A. §§ 1644-45 (Supp. 1, 1975), supplement the extensive regulation of the area already provided by the Act, 15 U.S.C. §§ 1642-44 (1970), and Regulation Z, 12 C.F.R. § 226.13 (1975), which, among other things, prohibit the sending of unsolicited credit cards and limit the cardholder's maximum liability for the unauthorized use of the card to \$50. This protection now extends to business users as well as to consumers. 15 U.S.C.A. § 1645 (Supp. 1, 1975).

card matters, including cash discounts, tie-ins, and the assertion by the customer of defenses against the bank.

Merchants honoring bank credit cards sell the resulting sales slips (drafts) to the bank at a discount from their face value that ranges from 3 to 8 percent.⁴⁹ Some consumers have sought to take advantage of this fact by bargaining with merchants over the cash price, offering to pay cash with a lesser discount than given by the bank. Some merchants accept these offers,⁵⁰ thereby creating a truth in lending dilemma for themselves. By acknowledging that the cash price is inflated to cover the discount, the merchants in effect admit that part of the finance charge is hidden in the cash price—a fact not disclosed by the bank's truth in lending statement.⁵¹ Under the Fair Credit Billing Act, the card issuer is forbidden to prohibit merchants from offering this discount to consumers;⁵² and the discounted amount will not be deemed a "finance charge" if the amount is not more than 5 percent, the discount is available to all prospective buyers, and this availability is posted on signs at each public entrance and sales point in the merchant's establishment.⁵³

A card-issuing bank may not require merchants who wish to honor the card to sign up for other services offered by the bank.⁵⁴ For instance, a merchant wishing to honor a bank credit card may not want or need a checking account with the issuing bank. Under the anti-tie-in section, the bank may not impose a mandatory checking account requirement as a condition to the merchant's participation in the credit card plan.

The customer who buys goods with a bank credit card often will get into disputes with the merchant. If the goods do not per-

⁴⁹The merchants prefer to bear this discount loss to having to set up their own credit card system with its attendant problems. In addition, participation in the bank's credit card plan should mean considerable extra business, which in turn makes up for the discounted amount.

⁵⁰See 39 CONSUMER REP. 432 (1974). Consumers Union filed suit against the American Express Company when the latter refused to permit its card-honoring merchants to give the cash discount to the customer. The matter was settled, with American Express acceding. How truth in lending compliance is to be obtained was not explained.

⁵¹The bank's failure to disclose this information may not create a truth in lending violation if it can be shown that the bank was not informed that the merchant was offering a cash discount directly to consumers. See, e.g., *White v. Central Charge Serv.*, 285 A.2d 305 (D.C. Ct. App. 1971), *cert. denied*, 409 U.S. 895 (1972).

⁵²15 U.S.C.A. § 1666f(a) (Supp. 1, 1975).

⁵³*Id.* § 1666f(b); Reg. Z, §§ 226.4(i)(1)(i)-(ii). The regulation also requires that advertisements and other solicitations mention the cash discount if payment by credit card is possible. *Id.* § 226.4(i)(1)(iii).

⁵⁴15 U.S.C.A. § 1666g (Supp. 1, 1975).

form as warranted but the merchant refuses to remedy the problem to the satisfaction of the customer, the customer may wish to get the bank involved by balking at paying the credit card bill when sent by the bank. Prior to the Fair Credit Billing Act, the consumer typically had to pay the bank, since the contract the consumer signed at the time the card was issued by the bank likely contained a clause providing that such problems had to be settled between the consumer and merchant.⁵⁵ The consumer now is permitted to raise his disputes with the merchant against the bank if he first has tried to settle with the merchant, the amount of the initial transaction exceeds \$50, and the transaction took place in the consumer's state or within 100 miles of his mailing address.⁵⁶ The last two limitations do not apply if the card issuer has a close connection with the merchant—for example, an oil company and its local service stations—or if the card issuer has permitted use of the card to be advertised in a mail solicitation.⁵⁷

C. State Law Changes

A significant amendment to Indiana's version of the Uniform Commercial Code allows prevailing plaintiffs in fraud suits involving the sale of goods to recover attorneys' fees.⁵⁸ Another new stat-

⁵⁵In effect, this is a contractual agreement not to assert defenses against an assignee, made with the assignee itself. The Uniform Consumer Credit Code (UCCC) regulates the agreement by a buyer or a lessee not to assert defenses arising from a consumer credit sale or consumer lease. IND. CODE § 24-4.5-2-404 (Burns 1974). However, the UCCC expressly excludes from the definition of "consumer credit sale" "a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement." *Id.* § 24-4.5-2-104(2)(a). Thus the UCCC does not apply to the assertion of defenses by the customer against the issuer of a bank credit card.

⁵⁶15 U.S.C.A. § 1666i (Supp. 1, 1975). The reason for the territorial limitation is that most of the major bank credit cards are issued by local banks in the cardholder's neighborhood, while the cards are honored nationwide. If the cardholder on vacation in Florida buys shoddy goods with the card, it is considered unfair to require the bank to straighten out the long distance problem caused by the cardholder's peregrinations.

⁵⁷*Id.* § 1666i(a). The defenses which may be asserted by the cardholder do not include tort claims. *Id.*

⁵⁸

Remedies for material misrepresentation or fraud include all remedies available under [IND. CODE §§ 26-1-2-101 to -705 (Burns 1974)] for nonfraudulent breach. In all suits based on fraud or material misrepresentation, if the plaintiff recovers judgment in any amount, he shall also be entitled to recover reasonable attorney fees which shall be entered by the court trying the suit as part of the judgment in that suit. Neither rescission or a claim for rescission of the

ute amends the Indiana Uniform Consumer Credit Code (UCCC) to make it clear that closing costs are not part of the finance charge in consumer loans,⁵⁹ a point of some confusion in the original UCCC. The 1975 General Assembly also amended the UCCC provision dealing with wage assignments.⁶⁰

*Vernon Fire & Casualty Insurance Co. v. Sharp*⁶¹ and *Rex Insurance Co. v. Baldwin*⁶² are the decisions during the survey period of significance to consumers. In both cases the First District Court of Appeals, ignoring language of its own decisions from as recently as 1973,⁶³ upheld awards of punitive damages in breach of contract actions arising from the bad faith failure of insurance companies to honor claims.⁶⁴ In *Vernon* the court held that punitive damages are appropriate "where the conduct of the wrongdoer indicates a heedless disregard of the consequences, malice, gross fraud, or oppressive conduct."⁶⁵ The *Vernon* decision already has received national recognition and has implications for the recovery of puni-

contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

IND. CODE § 26-1-2-721 (Burns Supp. 1975), *amending id.* § 26-1-2-721 (Burns 1974). Even in its prior form this section was meant to make clear that, in a suit for fraud under Article 2 of the UCC, the plaintiff could both rescind and get the benefit of his bargain. The failure of attorneys to cite this section has led to some Indiana decisions which might have gone the other way. *See, e.g., Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁵⁹IND. CODE § 24-4.5-3-202(d) (Burns Supp. 1975), *amending id.* § 24-4.5-3-202 (Burns 1974). For the full text of the amendment see the Real Estate Settlement Procedures Act section, *infra* note 2. Whether closing costs are part of the finance charge in consumer sales has not yet been settled. *See* IND. CODE § 24-4.5-2-202(3) (treating reasonable closing costs as additional charges for disclosure purposes in consumer credit sales).

⁶⁰IND. CODE § 22-2-6-2 (Burns Supp. 1975), *amending id.* § 22-2-6-2 (Burns 1974). This amendment is discussed in the Secured Transactions section *infra*.

⁶¹316 N.E.2d 381 (Ind. Ct. App. 1974) (first district).

⁶²323 N.E.2d 270 (Ind. Ct. App. 1975) (first district).

⁶³*Physicians Mutual Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973); *Standard Land Corp. v. Bogardus*, 289 N.E.2d 803 (Ind. Ct. App. 1972).

⁶⁴Typically Indiana—and indeed most jurisdictions—had permitted punitive damages only in cases involving intentional torts. In consumer matters, however, the Indiana courts increasingly have favored the award of punitive damages. *See, e.g., Bob Anderson Pontiac, Inc. v. Davidson*, 293 N.E.2d 232 (Ind. Ct. App. 1973); *Capital Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁶⁵316 N.E.2d at 384. *See also Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

tive damages in all bad faith breach of contract cases.⁶⁶ The development of punitive damage recovery in consumer contract suits⁶⁷ should increase the likelihood of such suits, thereby encouraging increased awareness of consumers' rights.

VII. Contracts and Commercial Law

Gerald L. Bepko*

During the past year there have been several interesting developments in Indiana involving contract and commercial law. The following discussion is a cursory review of some of the most significant of those developments.

Some matters which might logically be considered here are discussed in the section of this survey on consumer law. This section does not duplicate that discussion. Most significant among these other matters are developments in the subject of remedies for breach of contract. First, the Indiana Court of Appeals continued to approve punitive damage awards in breach of contract actions where the defendant's conduct was oppressive;¹ secondly, the Indiana General Assembly amended a provision of the Sales Article of the Uniform Commercial Code to provide for the recovery of attorneys' fees in fraud actions.²

A. Statute of Frauds

It is not unusual for a person who has been disappointed with the results of some medical procedure to sue the person under whose care the procedure was administered claiming not only negligence, but also breach of contract to produce a specific medical result.³ In cases of this kind, defendants have often ar-

⁶⁶Ashman, *Contracts . . . Punitive Damages, What's New in the Law*, 61 A.B.A.J. 101 (1975).

⁶⁷See Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

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¹See pp. 131-32 *supra*.

²See p. 130 & note 58 *supra*.

³See, e.g., Annot., 43 A.L.R.3d 1221 (1972). Agreements of this kind are not merely implied contracts to use reasonable care, but are in the nature of warranties of cure.

gued that it is necessary for members of the medical profession to make positive, encouraging statements about medical procedures to give patients confidence and thus aid the recovery process. It has been argued that these "therapeutic assurances" should not be translated into contract liability and that, therefore, as a matter of policy, the only cause of action between patient and physician should be for the physician's failure to use reasonable care. Despite this argument courts have uniformly permitted juries to resolve the question of whether or not there was such a contract if there was proof of a "specific, clear, and express promise."⁴ In some cases a jury verdict for breach of contract to produce a specific medical result has been upheld even though there has been a finding that the defendant exercised reasonable care.⁵

This potential contract liability has apparently caused some discomfort for members of the medical profession. Not only is there potential interference with "therapeutic assurances," but the statute of limitations period for contract liability may be longer than for tort liability.⁶ In addition, medical malpractice insurance often does not protect against this form of contract liability.⁷ Finally, an agreement to produce a specific medical result may be in violation of the ethical standards of the medical profession.

In 1975 the Indiana General Assembly enacted two laws which

⁴See *Guilmet v. Campbell*, 385 Mich. 57, 70, 188 N.W.2d 601, 607 (1971).

⁵*Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929). In the *Hawkins* case the court reversed a jury award for the plaintiff on the ground that the instructions on damages were erroneous. However, the court affirmed that a contract recovery was appropriate even though a negligence action had been dismissed without exception.

⁶Unlike most states Indiana has a special statute of limitations provision which limits actions against medical professionals to two years whether the action is in contract or tort. IND. CODE § 34-4-19-1 (Burns 1973). Presumably this statute would limit actions brought on agreements to produce a specific medical result. Arguably, this statute has been in part superceded by *id.* § 16-9.5-3-1 (Burns Supp. 1975). The new statute continues a two year limit on actions in contract or tort and presumably would limit actions on agreements to produce a specific medical result. If not, IND. CODE § 34-1-2-2 (Burns 1973) would limit such actions. It provides a twenty year limitation on "contracts in writing other than those for the payment of money." Of course, only agreements in writing are enforceable.

⁷See, e.g., *McGee v. United States Fidelity & Guar. Co.*, 53 F.2d 953 (1st Cir. 1931). See also *Security Ins. Group v. Wilkinson*, 297 So. 2d 113 (Fla. Ct. App. 1974) (involving a hospital); *Squires v. Hayes*, 13 Mich. App. 449, 164 N.W.2d 565 (1968); *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1940); *Berman v. Aetna Life Ins. Co.*, 256 App. Div. 916, 10 N.Y.S.2d 860 (1939) (both *Safian* and *Berman* are distinguishable from *McGee* because they involved an insurance policy specifying that the physician should not enter into a contract to cure); *Sutherland v. Fidelity & Cas. Co.*, 103 Wash. 583, 175 P. 187 (1918).

should minimize, and perhaps eliminate, this kind of physician's contract liability. First, an amendment to the general Statute of Frauds⁹ creates a new sixth category in the Statute. As amended, the Statute of Frauds provides that no action may be brought "upon an agreement, promise, contract, or warranty of cure relating to medical care or treatment" unless there is a writing signed by the party to be charged.⁹ Secondly, the General Assembly enacted a comprehensive law dealing with the rights and procedures by which injured patients may sue health care providers.¹⁰ Among other things, this law provides that unless there is a writing signed by the health care provider "[n]o liability shall be imposed . . . on the basis of an alleged breach of contract, express or implied, assuring results to be obtained from any procedure undertaken in the course of health care"¹¹

The reason for the simultaneous enactment of these two laws is not readily apparent since they appear to cover the same general subject matter. There are some subtle differences in the application of the two provisions, but these differences do not suggest any pattern for explaining the possible duplication. For example, the Malpractice Act creates the protection of the writing requirement for "health care providers" in the course of providing "health care."¹² A health care provider is defined as a "person . . . licensed by this state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist"¹³ However, the protection of the Act is only available to those health care providers who are qualified, and a patient's remedy against a "nonqualified" health care provider "will not be affected by the terms and conditions" of the Act.¹⁴ Qualification under the Act requires proof of financial responsibility and payment of a surcharge to the Indiana Patient's Compensation Fund.¹⁵ On the other hand, the new general Statute of Frauds provision applies to agreements "relating to

⁹IND. CODE § 32-2-1-1 (Burns Supp. 1975), *amending id.* § 32-2-1-1 (Burns 1973).

⁹*Id.* § 32-2-1-1 (Burns Supp. 1975).

¹⁰*Id.* §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975) [hereinafter referred to as the Malpractice Act].

¹¹*Id.* § 16-9.5-1-4.

¹²Section 16-9.5-1-1(i) provides:

"Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

¹³*Id.* § 16-9.5-1-1(a).

¹⁴*Id.* § 16-9.5-1-5.

¹⁵*Id.* § 16-9.5-2-1.

medical care or treatment.” In this context the expression “health care” used in the Malpractice Act could have a broader meaning than the expression “medical care or treatment” used in the amended Statute of Frauds. Thus, it is possible that a health care provider could be furnishing “health care” and thus be protected by the Malpractice Act and yet may not be furnishing “medical care or treatment” in order to obtain the protection of the new general Statute of Frauds provision. This could become important if any of those health care providers failed to “qualify” under the Malpractice Act. Furthermore, physicians, who are undoubtedly providing “medical care” within the meaning of the new general Statute of Frauds provision, would be protected by that provision even though they had failed to “qualify” under the Malpractice Act. This residual protection for at least some “non-qualified” health care providers appears to be inconsistent with the policy of the Malpractice Act denying protection to those health care providers who are not “qualified.”¹⁶

B. Modification of Contracts

Perhaps in homage to logical precision, though for somewhat obscure historical reasons, English and American courts have refused to enforce modifications of contracts unless the party deriving benefit from the modification furnished new consideration.¹⁷ The only apparent commercial policy served by this technical restriction is the protection it provides against modifications extorted under a threat of nonperformance.¹⁸ There is little evidence that businessmen ever observe, or even know about, this restriction on their ability to adjust their relationships. Recognizing the shallowness of this doctrine, the drafters of the Uniform Commercial Code provided that “an agreement modifying a contract . . . needs no consideration to be binding.”¹⁹ The restriction thus no

¹⁶*Id.* § 16-9.5-1-5. The section provides that “[a] health care provider who fails to qualify under this article . . . is not covered by the provisions of this article and is subject to liability under the law without regard to the provisions of this article.”

¹⁷See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 61, at 120-22 (1970).

¹⁸The doctrine and the resultant restriction may have evolved in cases where there was fear that extortion existed. See *Stilk v. Myrick*, 2 Camp. 317, 170 Eng. Rep. 1168 (C.P. 1809). For a case in a commercial context where there appeared to be a form of extortion, although the court emphasized the logical precision of the consideration doctrine, see *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 844 (1891).

¹⁹IND. CODE § 26-1-2-209(1) (Burns 1974) [hereinafter referred to as UCC or Code].

longer applies for all "transactions in goods."²⁰ However, the Official Comments to the UCC make it clear that only modifications made in good faith will be enforced; modifications "without legitimate commercial reason" will be ineffective.²¹ This seems to continue the protection against extorted modifications provided by the blanket unenforceability of the common law while at the same time providing businessmen both flexibility in their activities and operating rules consistent with their practices.

In *Seastrom, Inc. v. Amick Construction Co.*²² and *Myers v. Maris*,²³ the Court of Appeals this past year had an opportunity to reconsider these issues but declined to do so. The court stated in *Seastrom*, without discussion, that "any such modification must be supported by a new and distinct consideration."²⁴ It is not clear why the court did not apply the UCC principle in *Seastrom*. The opinion did not make it clear whether the modified agreement was for a sale of goods, a lease of goods, or a lease of goods with an option to purchase.²⁵ If a sale of goods was involved, it is clear that the court should have applied the UCC; but even if the transaction involved a lease, it could have been a transaction in goods to which the UCC should have been applied.²⁶

C. Broad Hold Harmless Clauses

Broad hold harmless clauses are terms in contracts which obligate one of the parties to indemnify the other party for any liability which results from some common venture, whether the liability results from the fault of the person making the promise of indemnity or the fault of the promisee.²⁷ For example, sub-

²⁰Section 26-1-2-209(1) applies to contracts "within this article." Section 26-1-2-102 provides that "this article applies to transactions in goods."

²¹UNIFORM COMMERCIAL CODE § 2-209, Comment 2.

²²315 N.E.2d 431 (Ind. Ct. App. 1974).

²³326 N.E.2d 577 (Ind. Ct. App. 1975).

²⁴315 N.E.2d at 433.

²⁵*Id.* at 432. It is clear that the asphalt plant, which was the subject of the agreement, constituted "goods." See IND. CODE § 26-1-2-105(1) (Burns 1974).

²⁶Courts have applied the UCC in lease transactions. See, e.g., *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (N.Y. City Ct. 1969); *Owens v. Patent Scaffolding Co.*, 14 UCC REP. SERV. 610 (N.Y. Sup. Ct., Kings County, March 8, 1974).

²⁷The following is an example of this kind of broad hold harmless clause: The Subcontractor shall indemnify and hold harmless the Contractor and all of his agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the Subcontractor's work whether it is caused in part or in whole by a party indemnified hereunder. In any and all

contractors often make such promises to general contractors in connection with construction projects. If the general contractor negligently injures an employee of the subcontractor, and the injured employee sues the general contractor, the general contractor may invoke the broad hold harmless clause and shift the liability.²⁸ Being thus forced into the role of an insurer can have a pernicious effect on the promisor, especially if the promisor's business insurance does not cover contract liability. Although Indiana courts have avoided the harshness of some hold harmless clauses through narrow construction²⁹ and have declared other hold harmless clauses unconscionable where unequal bargaining power was present,³⁰ they have sustained the premise that these clauses are enforceable.³¹

In an effort to protect construction contractors against the pernicious effects of these clauses, the 1975 Indiana General Assembly enacted a law declaring broad hold harmless clauses to be "against public policy" and "void and unenforceable."³² The new law does not, however, apply to contracts made before July 1, 1975.³³ The new law also does not apply to highway construction

claims against the Contractor, or any of his agents and employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount of type of damages, compensation or benefits payable by or for the Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

HANDBOOK FOR SUBCONTRACTORS, B 4-5 (1973) (compiled by the Indiana Subcontractors Association, Inc., 4755 Kingsway Drive, Indianapolis, Indiana 46205). There are other less severe forms of hold harmless agreements which do not apply where the promisee is at fault. *See, e.g.*, AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, art. 11.20 (The American Institute of Architects, Jan. 1972 ed.).

²⁸This situation was adapted from *Di Lonardo v. Gilbane Bldg. Co.*, 334 A.2d 422 (R.I. 1975).

²⁹*Auto Owners Mut. Ins. Co. v. Northern Ind. Pub. Serv. Co.*, 414 F.2d 192 (7th Cir. 1969); *Norkus v. General Motors Corp.*, 218 F. Supp. 398 (S.D. Ind. 1963); *General Tel. Co. v. Penn Cent. Co.*, 149 Ind. App. 50, 270 N.E.2d 337 (1971); *General Accident & Fire Assurance Corp. v. New Era Corp.*, 138 Ind. App. 349, 213 N.E.2d 329 (1966).

³⁰*Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

³¹*Indemnity Ins. Co. of N. America v. Koontz-Wagner Elec. Co.*, 233 F.2d 380 (7th Cir. 1956). For a recent case in another jurisdiction reaching the same conclusion on this point see *Di Lonardo v. Gilbane Bldg. Co.*, 334 A.2d 422 (R.I. 1975).

³²IND. CODE § 26-2-5-1 (Burns Supp. 1975).

³³The law is not retroactive probably in order to avoid a challenge under the contract clause of the United States Constitution. *See* note 129 *infra*.

contracts³⁴ or construction contracts "if liability insurance normally available within the United States at standard rates cannot be obtained for the facility . . . because it constitutes a dangerous instrumentality."³⁵

D. Warranty

1. Privity—The Uniform Commercial Code

In *Karczewski v. Ford Motor Co.*,³⁶ the United States District Court for the Northern District of Indiana held that there is no privity of contract requirement in a suit brought on a warranty of fitness for a particular purpose under UCC section 2-315.³⁷ The plaintiff was a purchaser of a secondhand Ford automobile which had been driven 16,000 miles by the first owner. Shortly thereafter the plaintiff was injured when the car went out of control because of, as the plaintiff alleged, a defective carburetor spring. The plaintiff sued Ford, the manufacturer, and the case was tried successfully by the plaintiff before a jury on three theories: negligence; the principle found in *Restatement (Second) of Torts*, section 402A;³⁸ and the UCC warranty of fitness for a par-

³⁴It is not apparent why highway construction contracts have been excluded from this law, although they have been excluded from other legislation protecting contractors. See IND. CODE § 5-16-5.5-1(c) (Burns 1974) (highway contractors were specifically excluded from the statute providing for bonds to protect subcontractors).

³⁵*Id.* § 25-2-5-2 (Burns Supp. 1975). This exemption appears to cover contracts made by public utilities where the construction work is undertaken on a facility such as a nuclear reactor.

³⁶382 F. Supp. 1346 (N.D. Ind. 1974).

³⁷In rendering its decision the court relied on *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970). In *Filler* a 16-year-old boy lost his right eye when he was hit with a baseball and his baseball sunglasses shattered. The sunglasses had been advertised by the Rayex Corporation as suitable for wearing while playing baseball. After a bench trial the trial judge entered a judgment against the defendant Rayex for \$101,000. Even though there was no privity between the plaintiff and the defendant, the court relied on breach of the warranty of fitness for a particular purpose as one of its grounds for allowing recovery. The court of appeals affirmed this ruling, emphasizing that, while advertised as suitable for wearing while playing baseball, the sunglasses were not made of plastic or shatterproof glass and thus were not fit for the particular purpose for which they were sold.

³⁸RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides as follows:
Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product,

ticular purpose.³⁹ Ford objected to the third theory on the ground that there was no privity of contract between it and the plaintiff. The court found that Ford was a "seller" and that the plaintiff was a "buyer" within the meaning of those words in UCC section 2-315⁴⁰ and that this "seller" had warranted that the automobile was fit for the particular purpose of ordinary driving on streets. A breach of the warranty occurred when the automobile proved to be unfit for ordinary driving by going out of control.

This part of the holding of the *Karczewski* case, viewed in its broadest sense, may present some problems in terms of the scope of the principle established. For example, it may not be completely clear whether the decision removes the privity barrier altogether for suits under section 2-315 or whether it approves only a suit against a remote seller whose conduct has actually given rise to the buyer's reliance and the warranty. If the court intended the former, there would seem to be an unreasonable burden placed on sellers of goods, since they would have to stand responsible for the disappointed expectations of subsequent buyers even if, as remote sellers, they had nothing to do with creating particular expectations and even though they gave no assurance that their products would be fit for the purposes for which they were ultimately used. As a result, the principle of not requiring privity probably should be confined to those cases where remote sellers have reason to know that their advertising will cause remote buyers to presume the product's fitness for the purpose described in the advertising. Indeed, the court in *Karczewski* began its recitation of the facts by describing the plaintiff's testimony on Ford's advertising.⁴¹ This suggests that the court intended the limitation on its holding discussed above.

and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

³⁹IND. CODE § 26-1-2-315 (Burns 1974) provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

⁴⁰382 F. Supp. at 1352.

⁴¹The court recited the fact that the defendant had advertised on television, radio, and in newspapers. *Id.* at 1348.

Perhaps more important, however, is the question of whether the principle of *Karczewski* should be applied to those cases where the plaintiff has suffered economic loss⁴² unaccompanied by personal injury or property damage. Courts have disagreed over whether the privity barrier should be removed in cases where the plaintiff suffered only economic loss,⁴³ but have agreed that cases involving only economic loss present questions of policy which may be different from those involved in personal injury or property damage cases.⁴⁴ A logical extension of *Karczewski* would permit recovery against remote sellers for economic loss since the UCC remedies sections provide for recovery for economic loss as well as personal injury or property damage losses.⁴⁵ This extension should probably not be made, however, without coming to grips with the possibly variant questions of policy involved in economic loss cases. As a result, the holding of *Karczewski* on the question of privity should probably be limited to cases where the

⁴²The expression "economic loss" has been coined to describe those losses which are not associated with personal injury or property damage. It includes the lost value which results from the buyer not having a product of the quality required by his agreement and lost profits caused by the buyer not having full use of a conforming product. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-5 (1972) [hereinafter cited as WHITE & SUMMERS]; Note, *Economic Loss in Product Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

⁴³Courts have permitted recovery against a remote seller on the tort theory of strict liability where only economic loss was involved. See *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). Some courts have permitted recovery on a UCC warranty theory. See *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459, 6 UCC REP. SERV. 96 (1969); *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967); *Continental Copper & Steel Indus. Inc. v. E. C. "Red" Cornelius, Inc.*, 104 So. 2d 40 (Fla. Ct. App. 1958); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965). Most courts, however, have denied recovery where there is only economic loss. See, e.g., *Poldon Eng'r & Mfg. Co. v. Zell Elec. Mfg. Co.*, 1 Misc. 2d 1016, 156 N.Y.S.2d 169 (N.Y. City Ct. 1965); *State ex rel. Seed Prod. Corp. v. Campbell*, 250 Ore. 262, 442 P.2d 215 (1968); *Henry v. John W. Eschelman & Sons*, 99 R.I. 518, 209 A.2d 46, 2 UCC REP. SERV. 154 (1965); *Kyker v. General Motors Corp.*, 214 Tenn. 521, 381 S.W.2d 884 (1964); *Oliver Corp. v. Green*, 54 Tenn. App. 647, 393 S.W.2d 625 (1965). See also WHITE & SUMMERS § 11-5.

⁴⁴See, e.g., *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

⁴⁵According to IND. CODE § 26-1-2-714 (Burns 1974), the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted and, also, in a proper case, any incidental and consequential damages.

plaintiff has suffered personal injury or property damage.⁴⁶ Thus limited, the application of UCC section 2-315 in *Karczewski* appears strikingly similar to the principle found in section 402A of the *Restatement (Second) of Torts*, although some differences might come into play in connection with disclaimers,⁴⁷ notice of defects,⁴⁸ and the statute of limitations.⁴⁹

2. Privity—Sale of Homes

The Indiana courts this year also dealt with the problem of privity of contract in the context of a sale of a residential dwelling. Four years ago, in the celebrated case of *Theis v. Heuer*,⁵⁰ the Indiana Supreme Court adopted the principle that a builder-vendor of a residential dwelling made an implied warranty to a vendee of fitness for habitation. The vendee thus could sue the vendor for breach if the residential dwelling was not habitable. This year, in *Barnes v. MacBrown & Co.*,⁵¹ the First District Court

⁴⁶In fact the court may have signaled this limitation when it emphasized that there was no privity requirement "under the circumstances of the present suit." 382 F. Supp. at 1352 (emphasis added).

⁴⁷In strict liability cases disclaimers should have little or no effect. *Arrow Transp. Corp. v. Fruehauf Corp.*, 289 F. Supp. (D. Ore. 1968); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970); *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969). See RESTATEMENT (SECOND) OF TORTS § 402A, Comment M (1965). On the other hand, disclaimers may be very significant in actions on UCC warranties. See IND. CODE § 26-1-2-316 (Burns 1974). It should be noted that section 108 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C.A. § 2308 (Supp. 1, 1975), will make all disclaimers of implied warranties ineffective with respect to goods manufactured after July 4, 1975, where any written warranty is made to a consumer or where a supplier enters into a service contract with a consumer with respect to the goods.

⁴⁸See IND. CODE § 26-1-2-607(2) (Burns 1974) which provides that in order to preserve a claim for breach of warranty the buyer must give reasonable notice. There is no such requirement in suits brought on the principle found in section 402A of the *Restatement (Second) of Torts*.

⁴⁹In Indiana the statute of limitation in strict liability cases is 2 years. IND. CODE § 34-1-2-2 (Burns 1973). Under the UCC the statute of limitations period is 4 years after the breach occurs, which is usually at the time of tender of delivery. *Id.* § 26-1-2-725(1) (Burns 1974).

⁵⁰280 N.E.2d 300 (Ind. 1972), adopting opinion of 149 Ind. App. 52, 270 N.E.2d 764 (1971), discussed in Lockyear, *Torts, 1973 Survey of Indiana Law*, 7 IND. L. REV. 262, 268 (1973), & *Contracts and Commercial Law*, *id.* at 56-57. See also *Gable v. Silver*, 258 So. 2d 11 (Fla. Ct. App.), *aff'd*, 264 So. 2d 418 (Fla. 1972); *Davis v. Vintage Enterprises Inc.*, 23 N.C. App. 581, 209 S.E.2d 824, 15 UCC REP. SERV. 1066 (1974) (the court found an implied warranty of habitability for a mobile home).

⁵¹323 N.E.2d 671 (Ind. Ct. App. 1975).

of Appeals declined an opportunity to extend the principle of the *Theis* case to protect subsequent purchasers of a home. The builder, MacBrown, sold the house to Shipman in 1968. Shipman, in turn, sold the house to Barnes in 1971. After taking up residence in the house, Barnes discovered a large crack around three of the basement walls. The crack caused leaking, requiring \$3,500 in repair expenditures. Barnes sued MacBrown for breach of implied warranty. The court of appeals held that the trial court's dismissal of the complaint was appropriate because no privity of contract existed between Barnes and MacBrown.⁵² *Barnes* apparently involved only economic loss. Therefore, it is similar to the decisions in defective product cases, discussed above, which have imposed a privity requirement where the plaintiff suffered only economic loss.⁵³

3. Disclaimers

In recent years many courts have adopted the view that warranty disclaimers contained in warranty booklets delivered to the buyer along with, for example, an auto⁵⁴ or airplane,⁵⁵ do not bind the buyer because these disclaimers are simply not part of the bargain in fact between the parties. In *Karczewski*, discussed earlier, the defendant included disclaimers in such a "Warranty Facts" booklet, and this booklet apparently was in the auto at the time Karczewski took possession of it.⁵⁶ The court followed the apparent trend in ruling that these disclaimers did not as a matter of law prevent recovery on an implied warranty since, among

⁵²*Id.* at 672.

⁵³Although the *Barnes* court was not requested to deal with the question, it should be noted that there probably would be no warranty of habitability made by the immediate seller in this case. It would probably be inappropriate to require a private individual selling a used residential dwelling to make such a warranty. This is consistent with warranty principles applicable in sale of goods cases, where the warranty of merchantability is made only by persons who are merchants with respect to the kind of goods being sold. IND. CODE § 26-1-2-314 (Burns 1974). A merchant is a person "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary" *Id.* § 26-1-2-104.

⁵⁴*See, e.g.,* Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974); Zoss v. Royal Chevrolet, Inc., 11 UCC REP. SERV. 527 (Monroe County, Indiana, Super. Ct., Nov. 15, 1972), noted in *Contracts and Commercial Law, 1973 Survey of Indiana Law*, 7 IND. L. REV. 55, 61-62 (1973).

⁵⁵*See, e.g.,* Omni Flying Club, Inc. v. Cessna Aircraft Co., 315 N.E.2d 885 (Mass. 1974).

⁵⁶382 F. Supp. at 1349.

other things, the plaintiff "was never contractually bound by the contents of said book in any explicit sense."⁵⁷

4. Contributory Negligence

This year, in *Gregory v. White Truck & Equipment Co.*,⁵⁸ the Indiana Court of Appeals addressed, apparently for the first time, the issue of whether or not contributory negligence is a defense to an action on an implied warranty of fitness for a particular purpose.⁵⁹ The plaintiff, Gregory, purchased a new REO diesel tractor at retail from White. The tractor was to be fitted by White with a semitrailer hitch commonly known as a fifth wheel assembly. This fifth wheel assembly was attached through a process that involved welding ear tabs to the tractor frame. While Gregory was towing a cargo-laden trailer, the ear tabs broke off and, according to Gregory's proof, the trailer detached from the tractor causing the heavy trailer to force the tractor off the road and damage both the tractor and cargo. Gregory sued White, alleging, among other things, that White had breached the implied warranty of fitness for a particular purpose. The case was tried before a jury on this theory only, and White offered proof that Gregory was speeding at the time of the accident. White claimed that this speeding constituted negligence and contributed to the loss of control. The trial court's instructions to the jury were replete with the statement that if Gregory had been contributorily negligent, he could not recover for breach of warranty. After a verdict for the defendant, Gregory appealed.

In reversing the trial court on the basis of the contributory negligence instructions, the Second District Court of Appeals analyzed the defenses which are available in actions based on the principle found in section 402A of the *Restatement (Second) of Torts* or, as the court suggested, the "new warranty."⁶⁰ The court

⁵⁷*Id.* at 1352.

⁵⁸323 N.E.2d 280 (Ind. Ct. App. 1975).

⁵⁹Because the case arose before the UCC was adopted, the court was applying the Uniform Sales Act, ch. 192, § 15, [1929] Ind. Acts 628 (repealed 1963), which created a warranty of fitness for a particular purpose. 323 N.E.2d at 286. This warranty provision has been superseded by IND. CODE § 26-1-2-315 (Burns 1974). This section provides for a warranty of fitness for a particular purpose very similar to the one found in the Uniform Sales Act. Presumably, the discussion of the court with respect to contributory negligence should be applicable to cases arising under the UCC warranty of fitness for a particular purpose. It may also be applicable to cases which arise under the UCC warranty of merchantability, *id.* § 26-1-2-314, and, perhaps, cases which arise under the UCC express warranties, *id.* § 26-1-2-313.

⁶⁰323 N.E.2d at 285. For the wording of section 402A see note 38 *supra*.

found a consistent pattern in the cases of "generalized disapproval of contributory negligence, in its broad sense, as a defense"⁶¹ However, if the plaintiff's conduct was the sole cause of the injury, or if it constituted an incurred risk,⁶² or if it amounted to a misuse of the product, it would serve to defeat the plaintiff's claim.⁶³ In this context incurred risk apparently refers to voluntarily and unreasonably proceeding to encounter a known danger, and misuse of the product apparently refers to abnormal use of the product not contemplated by the defendant. The court reasoned that these standards should also be applied in suits brought on implied commercial warranties or, as the court referred to them, the "traditional warranties."⁶⁴ Therefore the trial court's instructions were improper because they permitted the jury to consider contributory negligence, of any kind, as an absolute defense.⁶⁵

On remand in this case, the trial court may have three further problems. First of all, it may be difficult to define misuse of the product. For example, if the product is the fifth wheel assembly, the fact that Gregory was driving too fast for conditions may not have been a misuse of the product. Secondly, if, as is more likely, the product is the tractor and driving too fast would constitute a misuse of it, a question arises as to whether any misuse will bar recovery or whether recovery will be barred only by unforeseeable misuse. It seems reasonable to conclude that some forms of misuse or abnormal use are foreseeable and, therefore, should not bar recovery. Most courts have concluded that the question of whether a particular form of misuse is foreseeable should be left to the jury.⁶⁶ Finally, the decision in *Gregory* seems to make contributory negligence entirely irrelevant unless it constitutes misuse or incurred risk. If, therefore, the jury decided that there was a breach of warranty and no misuse, or only a foreseeable misuse, the fact that Gregory was driving too fast for conditions would not affect the verdict. This seems unnecessarily harsh since it would mean that White would be responsible in full for injuries which may have been exaggerated by Gregory's

⁶¹323 N.E.2d at 286.

⁶²In Indiana, courts have been careful to note a distinction between assumed risk and incurred risk. Assumed risk apparently is something which must come through an explicit agreement between the parties; incurred risk is the act of proceeding to encounter known dangers. See *Rouch v. Bisig*, 147 Ind. App. 142, 253 N.E.2d 883 (1970).

⁶³323 N.E.2d at 287.

⁶⁴*Id.* at 285.

⁶⁵*Id.* at 290.

⁶⁶See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 668-69 (4th ed. 1971); Dale & Hilton, *Use of the Product—When Is It Abnormal?* 4 WILLAMETTE L.J. 350 (1967).

conduct. It might, under these circumstances, be more equitable to permit the jury to consider the plaintiff's conduct in mitigation of damages even though this may require speculative judgments on apportionment of loss.⁶⁷

E. Due Process of Law and Commercial Transactions

During the past six years, the United States Supreme Court has invalidated three different state commercial collection laws on the grounds that they deprived debtors of due process of law. The Court in these cases invalidated certain state prejudgment garnishment,⁶⁸ replevin,⁶⁹ and attachment statutes.⁷⁰ Stimulated in part at least by these decisions, due process challenges to various commercial laws and practices have been litigated in the lower courts with somewhat mixed results.⁷¹ This year the Court of Appeals for the Seventh Circuit dealt with due process challenges to commercial practices in two cases: *Phillips v. Money*⁷² and *T.A. Moynahan Properties, Inc. v. Lancaster Village Cooperative, Inc.*⁷³ *Phillips* involved a possessory artisan's lien created by In-

⁶⁷*Cf. Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252, 11 UCC REP. SERV. 306 (1972). It should be noted that this is not a case where the court would have to adopt a comparative negligence standard. The seller's liability is based on warranty, not negligence.

⁶⁸*Sniadach v. Family Fin. Corp.*, 392 U.S. 337 (1969).

⁶⁹*Fuentes v. Shevin*, 407 U.S. 67 (1972). The Supreme Court appeared to recant the position taken in *Fuentes* in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Some clarification was furnished in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

⁷⁰*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

⁷¹The variety of devices which have been challenged is extensive. For example, due process challenges have been made to mechanics' liens. *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973); *Cook v. Carlson*, 364 F. Supp. 24 (S.D.S.D. 1973); *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, (Conn. 1975), in 38 Conn. Law Journal No. 43, April 22, 1975, at 1 (invalidating the Connecticut mechanics' lien law). Challenges also have been made to the warehousemen's lien created by UCC sections 7-209 and 7-210. *Melara v. Kennedy*, 15 UCC REP. SERV. 12 (N.D. Cal. 1974) (upholding the validity of those sections); *Jones v. Banner Moving & Storage, Inc.*, 78 Misc. 2d, 358 N.Y.S.2d 885, 15 UCC REP. SERV. 1 (Sup. Ct. 1974) (holding those sections unconstitutional). Due process challenges have been made to self-help repossession under UCC sections 9-503 and 9-504. The following cases found these sections valid: *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973). The following cases found these sections invalid: *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973).

⁷²503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

⁷³496 F.2d 1114 (7th Cir. 1974).

diana state law; *Moynahan* involved termination of a contract by a United States government agency.

In *Phillips* the plaintiff was the owner of an automobile which had been detained by the defendant, a mechanic, who claimed a lien under Indiana common and statutory law for services which he had rendered on the vehicle. The plaintiff filed an action for damages and recovery of the vehicle under 42 U.S.C. § 1983.⁷⁴ He claimed that the laws permitting this lien caused a delegation of "an essentially public or governmental function to the mechanic" and that the state had "inextricably entwined itself in the creditor's private activity"⁷⁵ According to the plaintiff this constituted state action. Because there was no requirement under the law for notice and hearing before giving effect to the mechanic's lien, the plaintiff claimed that the procedure deprived him of his property without due process of law.

The United States District Court for the Southern District of Indiana dismissed the action and the Seventh Circuit affirmed on two grounds. First, the court held that the "state merely establishes the legal context in which individuals conduct their private affairs"⁷⁶ and, therefore, the state action necessary to invoke fourteenth amendment protection was lacking. Secondly, the court held that possessory lien rights are inherently different from the collection devices that the Supreme Court found constitutionally objectionable. In those cases where the device was found objectionable, the creditor had only a property interest in the goods, while in this case the creditor had not only a property interest—a lien right—but also physical possession of the goods. The court stated that the interests of both antagonistic parties in the goods in question must be weighed in determining whether or not a procedure comports with due process requirements. In this case the creditor's lien right coupled with his possession of the goods constituted a sufficient interest so that there was nothing fundamentally unfair about his exercise of the artisan's lien. The court's reasoning seems consistent with other decisions upholding self-help creditors' remedies against procedural due process attack.⁷⁷ The court was careful to note, however, that its decision does not resolve whether self-help repossession under the UCC is consis-

⁷⁴42 U.S.C. § 1983 (1970).

⁷⁵503 F.2d at 993.

⁷⁶*Id.* at 994 (footnote omitted).

⁷⁷*Nolan v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. 1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973); *Nichols v. Tower Grove Bank*, 362 F. Supp. 374 (E.D. Mo. 1973); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); Annot., 18 A.L.R. FED. 223 (1974).

tent with the fourteenth amendment due process requirement.⁷⁸

Moynahan confronted the Seventh Circuit with a procedural due process challenge to the manner in which the Department of Housing and Urban Development (HUD) terminated a management contract. The plaintiff, Moynahan, was a management agent for Lancaster, the owner of multi-family low income housing financed through FHA. In the management contract between Lancaster and Moynahan, to which HUD endorsed its consent,⁷⁹ was a provision which permitted HUD to cancel the agreement, with or without cause, on 30 days' written notice. Moynahan and Lancaster were involved in a series of disputes during the term of the contract which resulted in a request by Lancaster to have HUD terminate Moynahan's contract. HUD responded to this request by sending a formal letter to Moynahan on April 26, 1972, notifying him that the agreement was terminated as of May 31, 1972. There was no explanation in this letter as to why Moynahan was being terminated.

Moynahan sued Lancaster and HUD alleging a deprivation of due process of law under the fifth amendment. The District Court for the Southern District of Indiana held that the termination by HUD was a nullity and enjoined HUD from terminating the contract without affording an appropriate procedure to protect Moynahan's rights. The Seventh Circuit affirmed the district court on the issue of the right, in general, to a due process hearing procedure. After finding that Moynahan had a property right in the contract with which HUD could not deal arbitrarily, the court stated that "the minimum requirements are a written statement of the reasons for the proposed action and an opportunity to present material . . . challenging the accuracy of supposed facts relied on and the rationality of the reasons stated."⁸⁰ However, the court found that in this case the discussions between Moynahan and HUD and the hearing in the district court had given Moynahan an opportunity to make known any facts or arguments on his behalf. Therefore, the court considered "the deficiencies in the notice of cancellation to have been adequately cured."⁸¹ Thus, since the termination in this particular case did not constitute a violation of Moynahan's due process rights, the trial court's decision nullifying the termination was reversed. This decision could

⁷⁸503 F.2d at 994 n.7.

⁷⁹Apparently when the FHA originally endorsed its consent to the contract, it received the cancellation power. HUD was the successor to this right. 496 F.2d at 1115.

⁸⁰*Id.* at 1118.

⁸¹*Id.*

affect the manner in which the government exercises rights under a variety of clauses found in procurement contracts.⁸²

F. Conversion of Checks

The Second District Court of Appeals this year was presented with an interesting problem involving conversion of checks. In *Yeager & Sullivan, Inc. v. Farmers Bank*,⁸³ the court found that Yeager & Sullivan, Inc. (Yeager) and Robert and William McCarty (McCarty) were engaged in a joint venture by which Yeager sold feeder pigs on credit to McCarty, retained a security interest in those feeder pigs while they were being developed, and, upon ultimate sale of the feeder pigs by McCarty, obtained payment from the proceeds. Because some problems arose with respect to these transactions which made Yeager insecure about McCarty's performance, Yeager notified all markets where McCarty was selling feeder pigs that any checks issued to McCarty in payment for feeder pigs should be made payable to McCarty and Yeager. In December and January 1968, five such checks were made payable by different buyers of feeder pigs to McCarty and Yeager in payment for feeder pigs. McCarty deposited these five checks for collection at the Farmers Bank without obtaining Yeager's indorsement.⁸⁴ In some cases Yeager's signature apparently was forged by McCarty and in other cases the checks were simply indorsed by only one of the two payees.⁸⁵ The Farmers Bank forwarded all these checks for collection, and they were paid by the

⁸²The Court of Appeals for the Seventh Circuit has since distinguished the holding in *Moynahan*. In *Harlib v. Lynn*, 511 F.2d 51 (7th Cir. 1975), the court refused to require notice and a hearing before HUD authorized the owner to increase rent for subsidized housing. The court said that the rent increase did not "totally abrogate" the lessees' property rights as did the termination of the contract in *Moynahan*. *Id.* at 55 n.11.

⁸³317 N.E.2d 792 (Ind. Ct. App. 1974).

⁸⁴In this case the checks which were of concern on appeal were made payable to Yeager and McCarty but the conjunctive word "and" was not used. IND. CODE § 26-1-3-116 (Burns 1974) provides that unless the instrument is made payable in the alternative (the use of the word "or"), the instrument is payable to all parties named as payees and may be negotiated only by all of them. The parties to the appeal in this case did not deny that the indorsement of both payees was required for proper negotiation. 317 N.E.2d at 794.

⁸⁵In either case there was a conversion since the instruments could not be negotiated or collected without the indorsements of both of the named payees. This would not, however, have been the case if Yeager had been a customer of the Farmers Bank. In that case IND. CODE § 26-1-4-205 (Burns 1974) would have permitted Farmers Bank to supply any indorsement of the customer which was necessary to title. The court did not address the question of why a joint venturer did not have the authority to sign the other joint venturer's name and thus negotiate the checks.

various payor banks. After discovering the unauthorized negotiation of these five checks, Yeager sued Farmers Bank for conversion.⁸⁶

The first obstacle confronting Yeager in this conversion action was UCC section 3-419(3), which provides that "a depository . . . bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business . . . dealt with an instrument . . . on behalf of one who was not the true owner is not liable in conversion" This section apparently was drafted to immunize depository and collecting banks from conversion liability while they are acting merely as agents for collection with respect to items deposited by their customers. Notwithstanding the apparent breadth and certainty of this section, courts uniformly have refused to apply it to relieve depository or collecting banks from liability.⁸⁷ In *Yeager* the trial court, following this pattern, found that the bank had not dealt with the instruments "in accordance with the reasonable commercial standards applicable to the business" ⁸⁸ and thus was not entitled to immunity.⁸⁹ This conclusion was not challenged on appeal.

⁸⁶Yeager also sued McCarty, but McCarty's motion for judgment on the evidence was sustained because a prior judgment barred the action. 317 N.E.2d at 794. Yeager clearly would have had a cause of action against the payor banks in this case under IND. CODE § 26-1-3-419 (Burns 1974), but these payor banks may have been located in different jurisdictions and suits against them could have presented an unnecessarily complicated method of seeking recovery.

⁸⁷See, e.g., *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609, 107 Cal. Rptr. 1 (1973); *Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank*, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381, 4 UCC REP. SERV. 617 (1967); *Ervin v. Dauphin Deposit Trust Co.*, 84 Dauph. Co. Rep. 280, 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (C.P. 1965); WHITE & SUMMERS at 504 (where the authors state that what has happened to this section "shouldn't happen to a dog"). There is sound policy for curtailing the effect of UCC section 3-419(3). In cases involving unauthorized payees' signatures, the payee clearly can sue a payor bank for conversion; it is equally clear that a payor bank can sue collecting and depository banks for breach of a presentment warranty. See IND. CODE § 26-1-4-207 (Burns 1974). This places the responsibility for these losses, in a rather circuitous fashion, on the depository bank. Rather than force the payee along this circuitous route, which may involve suits in different jurisdictions, it is probably better to permit a direct action against the depository bank.

⁸⁸317 N.E.2d at 794, quoting from IND. CODE § 26-1-3-419(3) (Burns 1974).

⁸⁹Other courts have also concluded that a depository bank did not act in accordance with reasonable commercial standards and thus could not use the immunity afforded by UCC section 3-419(3). See, e.g., *Salsman v. National Community Bank*, 102 N.J. Super. 482, 246 A.2d 162, 5 UCC REP. SERV. 799 (1968). In *Yeager*, the court could have based its finding of lack of

A more significant problem, however, was whether or not the defendant could assert in mitigation of its liability the fact that the funds which had been produced by the conversion had been applied in part for the benefit of the plaintiff. Farmers Bank offered proof that three of the five converted checks had been deposited in an account which was owned by McCarty and used for the exclusive purpose of furthering the joint venture feeder pig business. Funds drawn from this account, therefore, were spent for the direct benefit of Yeager since they were spent to discharge debts for which Yeager, as a joint venturer, would be responsible. The trial court, adopting this reasoning, found that Farmers Bank was only responsible as a converter for the amount of the two checks which had not been deposited in this account.

In reversing on this issue, the court of appeals held that the simple fact that the funds were applied for the benefit of Yeager was not sufficient to relieve the bank of its conversion liability because to do so would allow "the tortfeasor to dictate to the true owner how his property is to be used."⁹⁰ The court stated that in order to establish that its liability should be mitigated, the defendant would have to show that the converted funds were applied not only for the benefit of the plaintiff but as well to the specific debt or contractual purpose for which the funds were intended. In this case the court of appeals, on its own motion, found such a purpose. The court noted that two of the checks which were drawn on the account into which the three converted checks were deposited had been made payable to subfeeders who had a statutory lien on joint venture feeder pigs in their possession—a lien which was superior to Yeager's security interest.⁹¹ Since Yeager's interest in the pigs was subordinate to these lienholders, and since Yeager could not realize anything from the venture until these liens were discharged, the funds paid to these subfeeders were paid on "a specific debt to which the proceeds of sale were to apply."⁹² In addition, the court volunteered that "mitigation may be shown by a discharge of a lien the converted property was subject to."⁹³ Therefore, Farmers Bank could use the amount of these two checks in mitigation of their conversion liability.⁹⁴

reasonable commercial standards on the fact that the depository bank accepted some of these checks without the essential signature of one of the payees.

⁹⁰317 N.E.2d at 799.

⁹¹*Id.* at 800. IND. CODE § 32-8-29-1 (Burns 1973) provides that persons engaged in feeding hogs and other livestock shall have a lien upon such property for feed and care. *Id.* § 26-1-9-310 (Burns 1974) gives that lien priority over consensual security interests.

⁹²317 N.E.2d at 800.

⁹³*Id.*

⁹⁴The total face value of the five checks was \$6,528.73. The face value of

G. Franchising

1. Sales of Franchises

In recent years several states have enacted laws directed at abuses in the sale of franchises.⁹⁵ In its 1975 session the Indiana General Assembly joined this movement by enacting a comprehensive law dealing with franchise sale abuses.⁹⁶ The new law defines franchises as contracts by which a franchisee pays a franchise fee and in return is granted the right to do business under a marketing scheme prescribed by and identified with the franchisor or his trademark.⁹⁷ This includes contracts "whereby the franchisee is granted the right to sell franchises on behalf of the franchisor."⁹⁸ Although perhaps literally falling within this broad definition, certain agreements, such as those between credit card issuers and retailers, between trading stamp companies and retailers, or between manufacturers and distributors, are not considered franchises under the new law because there is, in those agreements, no "franchise fee;" there is only a fee for services rendered or a bona fide wholesale price of goods.⁹⁹

The law applies to any offer to sell a franchise or to any franchise relationship if the offeree or franchisee is an Indiana resident or if the franchised business will be operated in Indiana.¹⁰⁰ There are, however, two important exceptions to the coverage of the law. First, a franchise sale is exempt from the law's registration and supervision provisions if it is conducted by a large franchisor¹⁰¹ who makes certain disclosures to prospective

the three checks deposited in the McCarty account at Farmers Bank used in the feeder pig business was \$5,409.20. The trial court had awarded a judgment to the plaintiff for the two checks not deposited in the McCarty account. These two checks had a face value of \$1,119.53. The amount which was withdrawn from the McCarty account and used to pay the lienholders was \$1,900.00. This was the amount which the court of appeals held that the defendant depository bank was entitled to in mitigation. Therefore, on remand the trial court should increase the judgment amount to a total of \$4,628.73.

⁹⁵See, e.g., CAL. CORP. CODE §§ 31000-516 (West Supp. 1975); ILL. ANN. STAT. ch. 121½, §§ 701-40 (Smith-Hurd Cum. Supp. 1975); MICH. COMP. LAWS ANN. §§ 445.1501-45 (Supp. 1975-1976). In addition, the Federal Trade Commission has proposed a rule on disclosures in franchise sales. See 36 Fed. Reg. 21,607 (1971), revised at 39 Fed. Reg. 30,360 (1974).

⁹⁶IND. CODE §§ 23-2-2.5-1 to -50 (Burns Supp. 1975).

⁹⁷*Id.* §§ 23-2-2.5-1(a) (1), -(2).

⁹⁸*Id.* § 23-2-2.5-1(a) (3).

⁹⁹*Id.* § 23-2-2.5-1(i).

¹⁰⁰*Id.* § 23-2-2.5-2.

¹⁰¹*Id.* § 23-2-2.5-3. Many of the states which have enacted this kind of franchise legislation have this exemption or one similar to it. See, e.g., CAL. CORP. CODE § 31101 (West Supp. 1975). The Indiana exemption is based on two criteria involving the size and activity of the franchisor. First, the

franchisees. This exemption from registration and supervision by the securities commissioner is apparently designed to exclude those large franchisors who have sufficient assets and stability to pay claims made by franchisees. Also, these large franchisors and their franchise programs may be so well known that there is little potential for misrepresentation of the terms of the franchises. Finally, large franchisors can take advantage of the exemption only if they comply with the extensive disclosure requirement.¹⁰² The second exception is for franchise sales which are made by franchisees who are not affiliates of the franchisor and who make the sales for their own account. These sales are also exempt from the registration and supervision provisions.¹⁰³

The law creates two major mechanisms designed to protect against abuses in franchise sales. First, the franchisor must register the franchise with the securities commissioner before he makes any offer or sale of a nonexempt franchise.¹⁰⁴ The application for registration must include an elaborate series of disclosures about the nature of the franchise and the franchisor's business, and the information contained in this application must be made available to prospective franchisees.¹⁰⁵ Thereafter, based on these registration documents, the securities commissioner may take a series of steps designed to protect prospective franchisees. These steps include the following: Impounding franchise fees if the commissioner finds that the applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill obligations to provide such things as real estate improvements or equipment;¹⁰⁶ issuing stop orders denying the effectiveness of or suspending or revoking a registration under certain circumstances;¹⁰⁷

franchisor must have a net worth of not less than \$5 million. IND. CODE § 23-2-2.5-3(a) (Burns Supp. 1975). Secondly, the franchisor must have had at least 25 franchisees conducting business at all times during the 5-year period immediately preceding the time in which exemption is claimed, or must have conducted the business which is the subject of the franchise continuously for not less than 5 years preceeding that date. *Id.* § 23-2-2.5-3(b). These exemptions have been criticized. See Note, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C. IND. & COM. L. REV. 529, 546 (1971).

¹⁰²The franchisor must make the disclosures in writing and must furnish them to the franchisee at a time relevant to the franchisee's decision to enter into the franchise relationship. IND. CODE § 23-2-2.5-3(c) (Burns Supp. 1975) lists the specific disclosures that must be made.

¹⁰³*Id.* § 23-2-2.5-4.

¹⁰⁴*Id.* § 23-2-2.5-9.

¹⁰⁵*Id.* § 23-2-2.5-10 (listing the information which the application for registration must contain).

¹⁰⁶*Id.* § 23-2-2.5-12.

¹⁰⁷*Id.* § 23-2-2.5-14.

filing civil actions for injunctive or other relief;¹⁰⁸ conducting investigations with respect to possible violations of the law;¹⁰⁹ reviewing all advertising concerning franchises subject to registration and prohibiting advertising which the commissioner finds to be inconsistent with disclosure requirements;¹¹⁰ and, finally, referring matters to the prosecuting attorney of a county in which a violation of the law, for which criminal sanctions are provided, may have occurred.¹¹¹ To facilitate the investigation of possible violations, every franchisor is required to maintain a complete set of books, records, and accounts of sales subject to the law.¹¹² To facilitate private litigation and civil actions brought by the securities commissioner, every registrant must give an irrevocable consent appointing the secretary of state as his attorney to receive service of process in any civil action.¹¹³

The second major protective mechanism in the law is the private civil remedy provided in section 23-2-2.5-27.¹¹⁴ This section is a general antifraud provision, apparently drafted to parallel rule 10b-5 adopted under the Securities Exchange Act of 1934.¹¹⁵ In the past aggrieved franchisees have experienced some difficulties in proving a cause of action for traditional fraud, breach of contract, or violation of securities laws. This section should give some aid to these franchisees since it provides a new general vehicle for claims for abuses in franchise sales. If a party recovers judgment for a violation of this section, or of any other section of this law, he may recover consequential damages,¹¹⁶ interest at 8 percent on any judgment, and reasonable attorney's fees, unless the plaintiff knew the facts concerning the violation or the defendant acted prudently and innocently.¹¹⁷ The law also provides that

¹⁰⁸*Id.* § 23-2-2.5-32.

¹⁰⁹*Id.* § 23-2-2.5-33.

¹¹⁰*Id.* §§ 23-2-2.5-25, -26.

¹¹¹*Id.* § 23-2-2.5-36.

¹¹²*Id.* § 23-2-2.5-21.

¹¹³*Id.* § 23-2-2.5-24.

¹¹⁴Section 23-2-2.5-27 provides:

It is unlawful . . . in connection with the offer, sale or purchase of any franchise, . . . directly or indirectly: (1) to employ any device, scheme or artifice to defraud; (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or (3) to engage in any act which operates or would operate as a fraud or deceit upon any persons.

¹¹⁵15 U.S.C. §§ 78a-hh-1 (1970). Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), was promulgated by the Securities and Exchange Commission under section 10(b) of the Act. 15 U.S.C. § 78b (1970).

¹¹⁶IND. CODE § 23-2-2.5-28 (Burns Supp. 1975). The section apparently is designed to make it clear that a successful plaintiff is not limited to a rescission and restitution measure of recovery.

persons who materially aid or abet in a violation of the law are liable jointly and severally to the same extent as the person who is aided or abetted.¹¹⁸ However, there is no liability if "the person who aided and abetted had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist."¹¹⁹

2. *Franchisor's Liability for Debts of Franchisee*

Typically, in a franchise relationship, the franchisor makes efforts to introduce controls over the franchisee's operation of the franchise business. This is based, at least in part, on the requirements of the Lanham Act,¹²⁰ which encourage certain controls over the licensee of a trademark. At the same time the franchisor usually makes efforts to avoid liability for the operations of the franchisee's business. This is usually made explicit in the agreement between franchisor and franchisee. Franchisor's ambivalence on the subject of control and responsibility can cause difficult problems when a franchisee defaults in his obligations to creditors and the creditors seek recourse against the franchisor.¹²¹

A variation of this problem arose this year in the Indiana courts. In *Sheraton Corporation of America v. Kingsford Packing Co.*,¹²² the franchisor was Sheraton Corporation of America (Sheraton) and the franchisee was Fort Wayne Investment Company (Investment). Franchisor and franchisee entered into an elaborate agreement by which Sheraton gave Investment the right to do business as the Sheraton Fort Wayne Motor Hotel along with the benefit of the marketing plan used by Sheraton for motor hotels. In addition, Sheraton became the management agent for the hotel operation and served as the agent for Investment in making all contracts in the regular course of business. Many of these contracts were with a meat supplier, Kingsford Packing Company (Kingsford). In the course of their dealings over a 3-year period, Investment, and its agent Sheraton, never disclosed that the contracts were being made on behalf of Investment, not Sheraton. On the contrary, Porter, who identified himself as an employee of Sheraton, inspected Kingsford's plant, told Kingsford that Sheraton meat cutting policies had to be observed, and said

¹¹⁷*Id.*

¹¹⁸*Id.* § 23-2-2.5-29.

¹¹⁹*Id.*

¹²⁰15 U.S.C. § 1055 (1970).

¹²¹*Cf.* *Holland v. Nelson*, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970); *Nichols v. Arthur Murray, Inc.*, 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (1970).

¹²²319 N.E.2d 852 (Ind. Ct. App. 1974).

that because he was an employee of Sheraton, he could get meat from it in Chicago at a price lower than Kingsford's. Kingsford did not send bills for each delivery but sent monthly billings addressed to Sheraton for meat delivered. This limited credit was extended on the basis of Kingsford's previous dealings with Sheraton. Payments on account were made by check bearing the name Sheraton Fort Wayne Motor Hotel and, in most cases, Sheraton's trademark.

In 1971 Investment filed a voluntary petition in bankruptcy and Kingsford was given notice as a creditor. This was the first time that Kingsford knew that it was not dealing with Sheraton. Shortly thereafter Kingsford filed suit against Sheraton for accounts due. After a bench trial the court entered a judgment for Kingsford and Sheraton appealed. The Third District Court of Appeals affirmed on the ground that Sheraton could not deny its responsibility as a party to the contract. This conclusion was predicated on the venerable principle known as estoppel in pais.¹²³ The elements of this estoppel principle are as follows: (1) A false representation or concealment of material facts made with actual or constructive knowledge of the true facts; (2) intent that some other person would rely on the false representation; (3) reliance by the other person on the representation; and (4) lack of knowledge or reasonable means of obtaining knowledge of the true facts on the part of the other person.¹²⁴ In *Kingsford*, Sheraton had "knowingly permitted its trade name to be used . . . without qualification or indication of separate ownership, actively assisted that separate entity to appear identical to Sheraton in terms of physical facilities, management, services, and policies, and actively participated in the operation and management of such separate business entity."¹²⁵ This was a sufficient representation for estoppel to arise. The necessary intent was established by the fact that the natural and probable result of Sheraton's conduct would be reliance by other persons on Sheraton's apparent contractual commitment. Testimony on the subject by Kingsford employees was sufficient to show that there was reliance on the representation.

A final question was whether Kingsford had means of obtaining knowledge of the true facts. Sheraton proved that Investment

¹²³Estoppel in pais is a doctrine that prevents a party from alleging or denying a particular fact in consequence of his conduct. It literally "closes the mouth" of the party against whom it is invoked. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 105, at 691-92. (4th ed. 1971). For a classic case see *Griswold v. Haven*, 25 N.Y. 595 (1862).

¹²⁴319 N.E.2d at 856.

¹²⁵*Id.* at 857.

filed a "Certificate of Use of Assumed Name" in the office of the appropriate county recorder showing that Investment was operating as Sheraton Fort Wayne Motor Hotel. However, the court pointed out that Investment was a corporation and that every corporation using an assumed name must also file a copy of its assumed name certificate with the secretary of state.¹²⁶ The court took judicial notice of the fact that no such certificate had been filed with the secretary of state and concluded that this failure to comply strictly with the statutory requirement prevented Kingsford from being "charged with constructive notice of the Investment Company's use of an assumed name."¹²⁷ Since all of the elements of estoppel in pais were present, the court affirmed the trial court's judgment in favor of the plaintiff.

3. Franchise Termination

Franchise or distributorship agreements often include a right of termination which can be exercised by either party for some stipulated cause or, in some cases, without cause. Traditionally these provisions have been enforceable without regard for the motive of the party seeking termination.¹²⁸ However, along with rapid expansion of the use of the franchise form of organizing and financing business, there has developed an increasing sympathy for the franchisee or dealer whose rights are terminated. This sympathy has translated into an erosion of the tradition of enforcing termination provisions without regard for motive. Many states have enacted laws designed to protect various kinds of dealers or franchisees from prejudicial termination or non-renewal¹²⁹ and Congress enacted the Automobile Dealers Day in Court Act.¹³⁰ Courts have begun to place restrictions on the arbi-

¹²⁶*Id.* at 857-58, *citing* IND. CODE § 23-15-1-1 (Burns 1972).

¹²⁷319 N.E.2d at 858.

¹²⁸*See, e.g.,* Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940); Byrd v. Crazy Water Co., 140 S.W.2d 334 (Tex. Civ. App. 1940).

¹²⁹*See, e.g.,* IND. CODE § 7-2-1-23(a)(2) (Burns 1972). There are apparently 22 states with some kind of legislation which limits a franchisor's power to terminate. *See* 15 G. GLICKMAN, BUSINESS ORGANIZATIONS: FRANCHISING § 3.03[3], 3-17 to -50 (1974). Some state legislation has met with constitutional problems on the issue of retroactivity. *See, e.g.,* Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971). Also, state legislation has met with problems of federal preemption. *See* Mariniello v. Shell Oil Co., 368 F. Supp. 1401 (D.N.J. 1974).

¹³⁰15 U.S.C. §§ 1221-25 (1970). In addition, bills have been introduced in Congress which would affect the termination powers of franchisors. *See, e.g.,* H.R. 16,510, 93d Cong., 2d Sess. (1974); S. 2399, 92d Cong., 1st Sess. (1971); S. 3884, 91st Cong., 2d Sess. (1970); H.R. 13,628, 91st Cong., 1st Sess. (1969).

trary use of these termination powers¹³¹ and, of course, there has also been commentary in the journals.¹³²

In *Montgomery Ward & Co. v. Tackett*,¹³³ the First District Court of Appeals joined in this trend by imposing an obligation of good faith on the franchisor in dealings with his franchisees and affirming a jury verdict for a wrongful franchise termination. The franchisee, Tackett, operated a franchise catalogue store under a Montgomery Ward catalogue marketing plan. The franchise agreement between Ward and Tackett provided that Ward could terminate the franchise relationship in the event Tackett failed to follow Ward's "Current Policies and Procedures." Among Ward's policies was a plan whereby franchisees would pay at the end of each week for all merchandise ordered. If merchandise was not received, the franchisee was to file a form, known as an ICA, claiming credit for the merchandise not received. In the event the merchandise was received after an ICA was sent, the franchisee was to send another form known as an RNC.

Tackett apparently was not receiving due credit from Ward on ICA's and was not being given other promised services. To offset this, Tackett apparently filed improper ICA's and improperly withheld RNC's and payment for some merchandise. Although the relationship between Tackett and Ward was "fraught with difficulty and misunderstanding from its inception,"¹³⁴ Ward apparently made no effort to bring about an accommodation. Instead, Ward terminated the franchise on the ground that Tackett had failed to pay for merchandise and had created fictitious records, all in violation of Ward's "Current Policies and Procedures."

Seven months after the termination of the franchise, Ward brought an action against Tackett for the unpaid price of merchandise delivered, and Tackett counterclaimed alleging bad faith termination of his franchise. The trial court entered judgment on a jury verdict for Tackett on this counterclaim. The court of appeals affirmed this judgment stating that there was sufficient evidence to support a finding that Ward "failed to exercise good faith in its course of dealing with the Tacketts."¹³⁵ The court also

¹³¹See, e.g., *Shell Oil Co. v. Marinello*, 120 N.J. Super. 357, 294 A.2d 253 (1972), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

¹³²See Gilhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465; Hewitt, *Good Faith or Unconscionability—Franchise Remedies for Termination*, 29 BUS. LAW. 227 (1973); Hewitt, *Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 BUS. LAW. 1075 (1967).

¹³³323 N.E.2d 242 (Ind. Ct. App. 1975).

¹³⁴*Id.* at 245.

¹³⁵*Id.* at 246.

suggested that the fiduciary principles which govern the relationship between principal and agent apply, in appropriate cases, to the franchise relationship and that those fiduciary principles expose the principal or franchisor to liability for bad faith termination of the relationship even though the agreement provides for the absolute power to terminate.¹³⁶

H. Quasi Contract

1. Mistake of Law

Traditionally, the question of whether a person could recover money paid out under some mistaken assumption, other than in compromising a doubtful claim, often depended on whether the mistaken assumption was one of fact or law.¹³⁷ Courts permitted recovery if the mistaken assumption was one of fact¹³⁸ but refused recovery if the mistaken assumption was one of law.¹³⁹ This dichotomy seems to find its origin in an opinion of Lord Ellenborough written in 1802¹⁴⁰ in which he announced that "every man must be taken to be cognizant of the law,"¹⁴¹ thus implying that there should be no sympathy for a person who acted in ignorance of the law. Although Lord Ellenborough's apparent rationale and this dichotomy repeatedly have been criticized,¹⁴² and several exceptions engrafted on them,¹⁴³ the premise that there can be no recovery where there is only a mistake of law has gained wide acceptance, for a variety of reasons.¹⁴⁴ This year the First District

¹³⁶*Id.* See also Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971).

¹³⁷See RESTATEMENT OF RESTITUTION § 15-55 (1937).

¹³⁸*Id.* § 15.

¹³⁹*Id.* § 45.

¹⁴⁰*Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. 448 (1802).

¹⁴¹*Id.* at 472, 102 Eng. Rep. at 449.

¹⁴²See 3 A. CORBIN, CORBIN ON CONTRACTS § 617 (1960); J. DAWSON & G. PALMER, CASES ON RESTITUTION 868-73 (1969); RESTATEMENT OF RESTITUTION § 43, at 179 (1937).

¹⁴³Money paid out on a mistake of law by governmental agencies has been recovered apparently for the reason that this protects public funds. See *Neidt v. United States*, 56 F.2d 559 (5th Cir. 1932). Payments made by mistake of law to court officers have been recovered apparently because of the imposition of higher standard of conduct for court officials. See *Goldman v. Staten Island Nat'l Bank & Trust Co.*, 92 F.2d 496 (2d Cir. 1938); *Holderman v. Moore State Bank*, 383 Ill. 534, 50 N.E.2d 741 (1943). Payments made on mistake of foreign law apparently can be recovered. RESTATEMENT OF RESTITUTION § 46(c) & Comment c (1937). Finally, an exception seems to exist where a mistake based on a judgment is later reversed. See *Northwestern Fuel Co. v. Brock*, 139 U.S. 216 (1890).

¹⁴⁴Professor Corbin suggests that courts use mistake of law as an explanation for reaching a result based on one of the following reasons:

Court of Appeals affirmed this principle, holding that persons who had paid fines to the city of Evansville under an invalid ordinance could not recover the fines since the fines were paid voluntarily on the mistaken assumption that the ordinance was valid.¹⁴⁵

2. Recovery for "Necessaries" Furnished to Minors

It is axiomatic that the contracts of an unemancipated minor are avoidable by him,¹⁴⁶ although a minor may be responsible in quasi contract for the fair value of necessities furnished him. This year, in dicta, the Indiana Supreme Court commented on the liability of both the minor and his parents for certain kinds of necessities.¹⁴⁷ If parents are providing a home for an unemancipated minor, then apparently a third person may not recover from the child for furnishing room and board to the minor, since under those circumstances the room and board would not be necessary. Similarly, the person furnishing benefits such as room and board cannot recover against the parent since to do so would force the parent to pay for support away from the home when it was being offered at home. With respect to medical care, however, the court took a slightly different view. Where medical services are involved, there is an obligation on both the unemancipated child and his parents to pay the reasonable value of those services, whether or not there is proof that the parent failed to furnish them. The parental liability suggested by this case seems somewhat broader than that set forth in the *Restatement of the Law of Restitution*. The *Restatement* provides that the person furnishing the services can only recover against the parent if the services supplied are immediately necessary to prevent serious bodily harm

(1) [T]he mistake may not have been material or followed by much harm; (2) the money may have been due in equity and good conscience, though not in law; (3) the interests of some innocent third party must be protected; (4) the mistake may have been wholly unilateral and the other party can not be restored to his former position; (5) the payment may have been made in settlement of the disputed claim, with consciousness that the legal right was doubtful; (6) there may have been negligence in making the mistake and delay in seeking relief, with subsequent change of position; (7) the evidence to prove the mistake may not have been clear and convincing; (8) the plaintiff may have sought the wrong remedy, such as rescission when he could have gotten reformation

CORBIN, *supra* note 142, at 756-58 (footnotes omitted).

¹⁴⁵*City of Evansville v. Richard Walker*, 318 N.E.2d 388 (Ind. Ct. App. 1974).

¹⁴⁶IND. CODE § 29-1-18-41 (Burns 1972).

¹⁴⁷*Scott County School Dist. 1 v. Asher*, 324 N.E.2d 496 (Ind. 1975).

or suffering or if the parent is failing to supply the necessary services to a minor.¹⁴⁸

VIII. Criminal Law and Procedure

*William A. Kerr**

Three years have now elapsed since the Indiana Court of Appeals acquired jurisdiction to hear criminal appeals and began issuing opinions in criminal cases. The court of appeals filed approximately the same number of opinions during each of the first two years (approximately 195 in the first year and 190 in the second year) but increased this number by a substantial margin during the third year by filing approximately 265 opinions from June 1, 1974, to May 31, 1975. During the same three year period, the Indiana Supreme Court filed approximately 140 opinions during the first year, 100 opinions during the second year, and 101 opinions from June 1, 1974, to May 31, 1975. Criminal cases thus continue to constitute a major portion of the workload handled by both the supreme court and the court of appeals, and the number of such cases makes it essential for this survey to be somewhat selective in nature. The opinions that are included in this survey are discussed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and procedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.¹ Thereafter, the Indiana Supreme Court concluded that these new rules of procedure were in effect and would continue in effect unless the court decided to promulgate rules designed to supersede the ones enacted by the General Assembly or unless any particular provision enacted by the legislature conflicted with a

¹⁴⁸RESTATEMENT OF RESTITUTION §§ 113, 114 (1937).

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¹See Kerr, *Criminal Law and Procedure, 1974 Survey of Indiana Law*, 8 IND. L. REV. 137 n.1 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

“specific existing rule of this Court.”² Although this opinion helped to clarify the controversy concerning the validity of the new rules, the issue was not fully resolved because the court did not define what was meant by a “specific existing rule of this Court.” Thus the opinion could be interpreted as referring to the specific code or collection of Indiana rules of criminal procedure, specific rules announced formally from time to time by the court in various opinions, or rules of procedure that can be gleaned from the actions of the court taken in the various cases that are decided by it. A decision of the court during this past year, *Richard v. State*,³ suggests the last interpretation, but the court did not discuss the implications of its decision in this regard.

In the *Richard* case, the defendant contended that he was denied a fair trial because the jury was not permitted to view the scene of the offense. On appeal he argued that the statute⁴ which permitted such a view only in the discretion of the trial court and with the consent of all the parties was invalid because it encroached upon the rule-making authority of the courts. The Indiana Supreme Court agreed that the statute was questionable, observed that the court had previously questioned the validity of the statute, but concluded, “By acquiescence in its proscriptions, we have impliedly adopted it as a trial rule.”⁵ The court then held that the defendant had not been denied a fair trial, and it again observed, “Although we have declared that the rule was illegitimately begotten, we have thus far recognized it as our own.”⁶ This opinion thus suggests that it may not always be an easy matter to determine when a legislatively enacted rule of procedure is in fact valid since the rule may be in conflict with a prior decision of the supreme court which impliedly adopted a “specific” rule of procedure. The opinion also suggests the interesting possibility that the legislature, having adopted a rule of procedure, may not thereafter be able to repeal such a statutory procedure since the supreme court may have “impliedly” adopted the statutory procedure in the interim. Whatever the outcome may be, the *Richard* case suggests that a careful study must be made of the Indiana Supreme Court opinions before the validity of any of the individual provisions of the newly enacted procedural code can be determined.

²*Neely v. State*, 305 N.E.2d 434, 435 (Ind. 1974).

³319 N.E.2d 118 (Ind. 1974).

⁴IND. CODE § 35-1-37-3 (Burns 1975).

⁵319 N.E.2d at 119.

⁶*Id.* at 120.

A. Search and Seizure

1. Necessity for Arrest Warrants

Although the issues are not fully explored, the First District Court of Appeals clearly held in *Kendrick v. State*⁷ that an officer may make an arrest without a warrant for a felony if the officer has probable cause to make the arrest. The defendant argued that his arrest was invalid because it was made without a warrant, but the court of appeals upheld the validity of the arrest because probable cause for the arrest was sufficiently established. The court thus restated the traditional view but unfortunately did not discuss the line of Indiana cases that suggest that an arrest warrant is required if it is practicable for a warrant to be obtained.⁸

The court of appeals did not refer to the recent decision of the Indiana Supreme Court in *Garr v. State*,⁹ but that decision also reached the same conclusion without discussing the contrary line of cases. Although the contrary line of cases does exist in Indiana, the view expressed in the *Kendrick* and *Garr* cases now appears to have the support of the United States Supreme Court. That Court stated in its recent opinion in *Gerstein v. Pugh*¹⁰ that it had expressed a preference for the use of arrest warrants when feasible but had "never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."¹¹ In fact, the Court added the observation that a requirement that an officer obtain a warrant prior to any arrest "would constitute an intolerable handicap for legitimate law enforcement."¹²

2. Search Warrants

Prior to 1969, probable cause for the issuance of a search warrant could not be based upon hearsay but had to be established by facts personally known to the person filing the affidavit to obtain a search warrant.¹³ In 1969, the Indiana legislature changed this requirement by providing that probable cause for a search warrant may be established by hearsay so long as the hearsay is

⁷325 N.E.2d 464 (Ind. Ct. App. 1975).

⁸*Stuck v. State*, 225 Ind. 350, 264 N.E.2d 611 (1970); *Throop v. State*, 254 Ind. 342, 259 N.E.2d 875 (1970); *Bryant v. State*, 299 N.E.2d 200 (Ind. Ct. App. 1973); *Johnson v. State*, 299 N.E.2d 194 (Ind. Ct. App. 1973). For a discussion of these cases see 1974 *Survey of Indiana Law* 138-42.

⁹312 N.E.2d 70 (Ind. 1974).

¹⁰420 U.S. 103 (1975).

¹¹*Id.* at 113 (citations omitted).

¹²*Id.*

¹³*McCurry v. State*, 249 Ind. 191, 231 N.E.2d 227 (1967); *Rohlfing v. State*, 227 Ind. 619, 88 N.E.2d 148 (1949).

reliable information supplied by a credible person.¹⁴ In order to insure that the hearsay would be reliable, the legislature included a provision in the statute requiring the affiant to state in the affidavit that the information was received from a credible person who "spoke with personal knowledge of the matters contained therein" and to include in the affidavit a statement of the "facts within the personal knowledge of the credible person."¹⁵

Shortly after this statute was enacted, the Indiana Supreme Court discussed its effect in dicta in *Ferry v. State*.¹⁶ The *Ferry* case involved a search warrant that was obtained prior to the 1969 statute, and the warrant was found to be invalid because it was obtained on the basis of hearsay information. The information had been transmitted from police officers in Clinton, Iowa, to police officers in Louisville, Kentucky, and then to a police officer in Clarksville, Indiana, who filed the affidavit for the search warrant. Although the court based its holding on decisions prior to the 1969 statute, the court also observed that the warrant would have been invalid even under the new statute because the information was based on multiple or "totempole" hearsay and the affidavit did not state the facts known personally to the Iowa officer or the reasons why the Indiana officer believed the Iowa officer.¹⁷

The dictum in the *Ferry* case was followed during the past year by the Indiana Supreme Court in *Madden v. State*.¹⁸ In a 3-2 decision, the court accepted the view that multiple or "totempole" hearsay cannot be relied upon to obtain a search warrant under the 1969 statute. In the *Madden* case, the defendant was convicted of second degree murder on the basis of evidence obtained under a search warrant. The affidavit for the warrant was found to be invalid because it stated that certain information was reported by an unnamed person to the Greensburg City Police Department and then to the affiant who was a detective with the Indiana State Police.¹⁹ The court also noted that the affidavit generally failed to state the facts within the personal knowledge of the informers involved or the reasons why the affiant believed the informers. In so doing, the court emphasized that it would construe the statute strictly to insure that the reliability and credibility of hearsay would be determined by the magistrate called upon to

¹⁴IND. CODE § 35-1-6-2 (Burns 1975).

¹⁵*Id.*

¹⁶255 Ind. 27, 262 N.E.2d 523 (1970).

¹⁷*Id.* at 31-34, 262 N.E.2d at 527-28.

¹⁸328 N.E.2d 727 (Ind. 1975).

¹⁹The Indiana statute, as thus interpreted, places stricter limits on the use of hearsay than required by the United States Supreme Court which would permit the use of hearsay, even multiple or "totempole" hearsay, so long as it is shown to be reliable and credible.

issue a search warrant rather than by the affiant seeking to obtain the warrant.

The reliability of hearsay was also considered by the First District Court of Appeals in upholding the validity of a search warrant in *Mills v. State*.²⁰ In that case, the affidavit concluded with the statement that the "informant also furnished information to this affiant in the past that resulted in at least four (4) narcotics arrests and seizures of narcotics drugs."²¹ The defendant argued that this allegation was not sufficient to establish reliability since convictions did not result from the information furnished to the affiant, but the court concluded that reliability was shown by the fact that narcotics were seized. The court thus held that it is not necessary for the affidavit to allege that convictions resulted from information provided by an informer. In fact, the court observed that reliability can be shown by a statement in the affidavit that the informant had previously supplied valid information.²²

The First District Court of Appeals also held in *Hopkins v. State*²³ that a search warrant need not contain a statement of the facts establishing probable cause for the warrant provided that the affidavit showing probable cause is attached to the warrant and that reference is made to it in the warrant. The statute providing for search warrants²⁴ sets forth an example of a warrant which suggests that the probable cause affidavit is to be copied verbatim into the body of the warrant, and the *Hopkins* decision thus indicates that this is only a suggested form and is not mandatory.²⁵

3. Execution of Search Warrants

According to both the Indiana Constitution²⁶ and the Federal Constitution,²⁷ a search warrant must describe the items to be seized with particularity. The United States Supreme Court has held that this requirement "prevents the seizure of one thing under a warrant describing another" and emphasized that "nothing is left to the discretion of the officer executing the warrant."²⁸ In *Hopkins v. State*,²⁹ officers seized two pairs of shoes while search-

²⁰325 N.E.2d 472 (Ind. Ct. App. 1975).

²¹*Id.* at 474.

²²*Id.* See *Foxall v. State*, 298 N.E.2d 470, 473-74 (Ind. Ct. App. 1973), noted in 1974 *Survey of Indiana Law* 143.

²³323 N.E.2d 232 (Ind. Ct. App. 1975).

²⁴IND. CODE § 35-1-6-3 (Burns 1975).

²⁵See also *McAllister v. State*, 306 N.E.2d 395 (Ind. Ct. App. 1974).

²⁶IND. CONST. art. 1, § 11.

²⁷U.S. CONST. amend. IV.

²⁸*Marron v. United States*, 275 U.S. 192, 196 (1927).

²⁹323 N.E.2d 232 (Ind. Ct. App. 1975).

ing the defendant's apartment although the search warrant that they were executing described only one pair of shoes. The First District Court of Appeals held that the seizure was lawful despite the defendant's argument that the officers had no discretion under the warrant to seize the second pair of shoes. Relying upon *Hall v. State*,³⁰ an earlier decision of the Indiana Supreme Court, the First District Court of Appeals stated that "if in the course of a search the police discover items not named in the warrant which might have been seized in a search incident to an arrest, then those items may also be seized, pursuant to the search warrant."³¹ The rule as stated by the court of appeals, however, is broader than the holding in the *Hall* case. The supreme court stated the rule in that case as follows:

Where, as here, officers conduct a search pursuant to a valid search warrant in [a] search for specifically named fruits of a crime, we hold that all fruits of that specific crime found in the search whether named in the search warrant or not are admissible in evidence.³²

In reaching this conclusion, the supreme court relied upon a decision of the United States District Court for the Northern District of Indiana which did adopt the broader rule,³³ but the supreme court's statement suggested that an officer might not be permitted to seize anything not described in a warrant except those items specifically related to the offense for which the warrant was issued. The decision of the First District Court of Appeals in *Hopkins* now suggests that the broader rule should be followed so that an officer can seize any items found in a search, whether related to the particular offense for which the warrant was issued or to any other offense.

The First District Court of Appeals also issued another important opinion during the past year concerning the execution of search warrants. In *State v. Porter*,³⁴ police officers went to a certain house and, with the aid of binoculars, observed the defendant processing marijuana in another house nearby. The officers then obtained a search warrant, entered the house where the defendant was processing the marijuana, and seized the marijuana. Thereafter, the prosecutor conceded that the search warrant was invalid but attempted to sustain the seizure by relying on the "plain view" doctrine. The court of appeals first observed that the seizure could not be justified on the basis of the "plain view" doctrine

³⁰255 Ind. 606, 266 N.E.2d 16 (1971).

³¹323 N.E.2d at 236.

³²255 Ind. at 610, 266 N.E.2d at 18.

³³United States v. Robinson, 287 F. Supp. 245, 254-55 (N.D. Ind. 1968).

³⁴324 N.E.2d 857 (Ind. Ct. App. 1975).

since the marijuana was not discovered inadvertently during the course of a search.³⁵ The court then stated that the real question was whether the entry under an invalid warrant could later "be justified by reliance on related but distinct theories of law or evidence."³⁶ In answer to this question, the court concluded that the illegality of the search and the accompanying arrests could not be altered "by reliance on what the police could have done, or by reliance on how police conducted themselves before or after the improper entry and seizure."³⁷ Although the court properly recognizes the principle that an unlawful entry cannot be justified by what occurs following the entry, the opinion appears to go too far by saying that the entry cannot be validated by what the officers did "before" the entry. If the court meant by this language that an entry under an invalid search warrant could not be valid on the basis of some other theory, then the decision is contrary to the opinion of the Indiana Supreme Court in *Brown v. State*.³⁸ In the *Brown* case, officers obtained a warrant to search a restaurant for a cash register. They went to the restaurant at a time that it was open for public business, observed the cash register on a counter, and seized the cash register. Although the court rejected the defendant's contention that the search warrant was invalid, the court added that a search warrant was not necessary for the entry into a place open for public business and that the officers could have justified their entry on that basis even if the warrant had been invalid.³⁹

4. Consent to Searches

The United States Supreme Court held in *Schneckloth v. Bustamonte*⁴⁰ that a suspect who is not in custody does not have to be advised of his fourth amendment rights before being asked

³⁵For a discussion of the "inadvertence" rule see *Ludlow v. State*, 314 N.E.2d 750 (Ind. 1974). In that case, officers received information that seven people were in a certain house and that narcotics were being processed in a bedroom in the house. The officers learned that arrest warrants existed for two of the persons, so they entered the house, purportedly to execute the arrest warrants. As soon as they entered the house, one of the officers went to the bedroom and seized the narcotics which were there as described by the informant. The Indiana Supreme Court held that the seizure was invalid because a search warrant had not been obtained. It held that the officers could not justify the seizure on the basis of the "plain view" doctrine since they knew about the narcotics before entering the house and did not discover them inadvertently while in the house for another purpose.

³⁶324 N.E.2d at 859.

³⁷*Id.*

³⁸239 Ind. 358, 157 N.E.2d 174 (1959).

³⁹*Id.* at 366, 157 N.E.2d at 178.

⁴⁰412 U.S. 218 (1973), noted in 7 IND. L. REV. 601 (1974).

to consent to a search, but the language of the opinion would also appear to suggest that there is no requirement for such a warning even as to a suspect in custody.⁴¹ During the past year, the Indiana Court of Appeals reached the same conclusion concerning a suspect who was not in custody,⁴² but the Indiana courts have not resolved the question concerning the necessity for warning a suspect in custody. The issue was before the Indiana Supreme Court in *Pirtle v. State*,⁴³ but the holding in that case is clouded somewhat by the fact that the opinion also dealt with a violation of the defendant's fifth amendment rights. In that case, the defendant was arrested late one night and was advised of his fifth amendment rights concerning interrogations and the assistance of counsel. He promptly asked for an attorney and the officers did not interrogate him further. The next day, another officer asked the defendant to sign a consent to search his apartment and the defendant did so. The officer did not know that the defendant had asked for an attorney, and the officer did not provide the defendant with an attorney or advise the defendant of his fourth amendment rights concerning the search. The Indiana Supreme Court concluded that the consent to search was invalid because it was obtained at a time when the officer should not have been questioning the defendant and thus the "consent was a product of a violation of appellant's *Miranda* rights."⁴⁴ If the opinion had concluded at that point, the result would have appeared to be quite logical and proper, but the court sought to bolster this conclusion with additional reasoning that left some doubt as to the full import of the decision. The court emphasized the importance of counsel in assisting a person to make the decision to consent to a search and emphasized that the defendant had been in custody for twelve hours without being advised of his fourth amendment rights. The court then concluded that there is no "practical" reason for depriving a defendant in custody at the police station of the assistance of counsel in deciding to consent to a search and said, "We hold that a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent."⁴⁵ If the opinion is taken as a whole, it appears to hold that the consent was invalid because of the *Miranda* violation and the latter discussion merely emphasizes

⁴¹See *United States v. Campbell*, No. 74-1843 (4th Cir., Feb. 19, 1975); *United States v. Heimforth*, 493 F.2d 970 (9th Cir. 1974); *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973).

⁴²*Wills v. State*, 318 N.E.2d 385 (Ind. Ct. App. 1974). See also *Cooper v. State*, 301 N.E.2d 772, 775 (Ind. Ct. App. 1973).

⁴³323 N.E.2d 634 (Ind. 1975).

⁴⁴*Id.* at 638.

⁴⁵*Id.* at 640.

the reason why the *Miranda* violation was so critical. On the other hand, the language in the latter part of the opinion is so strong that it may indicate that there is a right to counsel at any time that a person in custody at a police station is asked to consent to a search. If so, the court has in effect required a defendant who is in custody to be advised of his fourth amendment rights before being asked to consent to a search, although the court is providing for this to be done by counsel rather than requiring the police officer to give the warnings.

5. *Stop and Frisk*

In *Elliott v. State*,⁴⁶ the Indiana Supreme Court reviewed the authority of an officer to conduct a "stop and frisk" and held specifically that the procedure is a "two-step" process. In that case, officers received information that a certain person was about to make a delivery of narcotics at a certain apartment. The officers went to the apartment and saw the defendant, a different individual, leaving the apartment. The defendant was known to have a record for drug-related offenses and was in the company of two known drug users. On the basis of this information, the officers stopped the three persons for interrogation. They then observed a bulge in the defendant's pocket, frisked the defendant, and found a revolver in the pocket. The court held that the circumstances warranted a "cursory investigation" so that the initial detention was lawful. When the bulge in the pocket was observed during the detention, this then justified the frisk of the defendant.

The decision is also important because it indicates that the supreme court has apparently lowered the burden of proof that the court of appeals had previously required to justify a stop and frisk. In the *Elliott* case, the Second District Court of Appeals had concluded that the officer did not have sufficient information to justify a detention of the defendant for questioning.⁴⁷ The court of appeals concluded that the officer might have had a right to investigate the matter but not the right to conduct a stop and frisk without additional reason to believe that the information was reliable. That court's view appears to be in accord with the view of the Third District Court of Appeals in *Jackson v. State*.⁴⁸ In the *Jackson* case, officers received a tip that the defendant was at a certain place carrying a gun. The officers located the defendant near a tavern sitting in his car in a parking lot. He was asked to

⁴⁶317 N.E.2d 173 (Ind. 1974).

⁴⁷309 N.E.2d 454 (Ind. Ct. App. 1974), noted in 1974 *Survey of Indiana Law* 146.

⁴⁸301 N.E.2d 370 (Ind. Ct. App. 1973).

step out of his car, and the officers then observed a pistol sticking out of his pocket. After he admitted that he did not have a permit for the pistol, he was arrested. The court of appeals held that the seizure was improper because the informer's tip was not shown to be reliable. The supreme court's decision suggests that officers are to be given more leeway in deciding when to stop and detain persons for investigative purposes than the court of appeals was willing to permit.

B. Lineups and Photographic Identifications

1. Lineups

After some eight years of controversy, the Indiana Supreme Court has apparently resolved the question in Indiana concerning the right to counsel at a lineup held prior to the filing of formal charges. In *Winston v. State*,⁴⁹ the court held that a defendant has no right to counsel at a lineup held before the defendant is formally charged by way of an information or an indictment. The case involved a situation in which the victim of an armed robbery recognized the robber and promptly notified the police. Within an hour of the robbery, the victim was called to the police station to identify the defendant. After observing the defendant through a window in the detective's room, the victim made a positive identification. Two members of the supreme court argued that the defendant had no right to counsel at this identification because it occurred within such a short period of time after the robbery, but the majority took this case as an opportunity to resolve the broader issues which had been in controversy for such a long period of time. In so doing, the court expressly overruled its earlier decision in *Martin v. State*,⁵⁰ which had held that a right to counsel existed at any "post-arrest" lineup except for identifications occurring immediately after an offense, and agreed with the Indiana Court of Appeals which had consistently held that there was no right to counsel at preindictment lineups because of the United States Supreme Court decision in *Kirby v. Illinois*.⁵¹ The *Kirby* case is not completely clear on this point because the opinion states that the right to counsel generally exists "after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."⁵² The rest of the opinion, however, ap-

⁴⁹323 N.E.2d 228 (Ind. 1975).

⁵⁰258 Ind. 83, 279 N.E.2d 189 (1972).

⁵¹406 U.S. 682 (1972). See *Pack v. State*, 317 N.E.2d 903 (Ind. Ct. App. 1974). Compare *Smith v. State*, 312 N.E.2d 896 (Ind. Ct. App. 1974), with *Collins v. State*, 321 N.E.2d 868 (Ind. Ct. App. 1975).

⁵²406 U.S. at 689.

pears to suggest that there is no right to counsel at a lineup held prior to the filing of an information or indictment, and the Indiana Supreme Court expressly accepted this interpretation of the opinion.⁵³

The *Winston* opinion is also significant because it may be used as a precedent for another purpose. The *Martin* case was decided in March of 1972 by the Indiana Supreme Court, and the *Kirby* case was decided approximately three months later by the United States Supreme Court. Since a state may impose higher standards than required by the Federal Constitution, Indiana courts theoretically should have continued to follow the *Martin* decision until the Indiana Supreme Court held otherwise. Nevertheless, the Indiana Court of Appeals consistently followed the *Kirby* decision, apparently assuming that the Indiana Supreme Court would eventually reverse *Martin*, and the Indiana Supreme Court proved that the assumption was correct. This question was not discussed, however, but the *Winston* case does provide a precedent for trial courts in Indiana to follow when they are confronted with a difference in the decisions of the state and federal supreme courts.

Although a defendant does not have a right to an attorney at a preindictment lineup, the *Winston* case does recognize that such lineups must be conducted fairly so as not to violate fundamental concepts of due process. The First District Court of Appeals, in *Hopkins v. State*,⁵⁴ held that fundamental due process would be violated when a witness at a lineup is told that a suspect is included in the group of persons in the lineup. This decision is in accord with *Sawyer v. State*⁵⁵ in which the Indiana Supreme Court held that it was improper for an officer to tell a witness that a suspect had been arrested and that the suspect's picture was included in a group of photographs being displayed to the witness. In dictum, the supreme court also suggested that the same rule should be applied to lineups.

2. Photographic Identifications

In *Rowe v. State*,⁵⁶ the Indiana Supreme Court held that the defendant was entitled to obtain discovery of photographs displayed to a witness during the pretrial investigation of the de-

⁵³*Accord*, *Commonwealth v. Lopes*, 287 N.E.2d 118 (Mass. 1972); *Chandler v. State*, 501 P.2d 512 (Okla. 1972). Compare *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), with *Moore v. Oliver*, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

⁵⁴323 N.E.2d 232 (Ind. Ct. App. 1975).

⁵⁵298 N.E.2d 440 (Ind. 1973). See also *Vicory v. State*, 315 N.E.2d 715 (Ind. 1974).

⁵⁶314 N.E.2d 745 (Ind. 1974).

fendant. The police had shown several albums of photographs to the witness shortly after the robbery involved and later had shown four additional photographs to the witness. This information was brought out during questioning of the witness at the trial, and the defendant then moved for production of the four photographs. The supreme court held that the motion should have been granted because the motion met the court's general requirements for discovery, but the court did not discuss the possibility that the defendant might have waived the right to discovery by waiting until the time of the trial to request the photographs.

C. Confessions and Admissions

1. Confessions

After the United States Supreme Court held in *Miranda v. Arizona*⁵⁷ that officers must first advise a suspect concerning his fifth amendment rights before initiating custodial interrogation, the United States Congress enacted a statute providing that a confession would still be admissible as evidence if found to be voluntary under the totality of all the circumstances even though all of the *Miranda* requirements were not fully satisfied.⁵⁸ Shortly thereafter, the Indiana General Assembly enacted a statute concerning the admissibility of confessions that is almost a verbatim restatement of the federal statute.⁵⁹ Although the federal and state statutes purport to limit the effect of a United States Supreme Court decision, the statutes are apparently being followed by various courts without much, if any, consideration as to their validity. For example, the Indiana statute was quoted and discussed in *State v. Cooley*⁶⁰ by the Third District Court of Appeals with the apparent assumption that the statute is valid and that trial courts should be following it in determining the voluntariness of confessions. This implied acceptance of the statutes has been apparent in the federal courts as well and was finally recognized by the United States Court of Appeals for the Tenth Circuit in *United States v. Crocker*.⁶¹ In that case, the court reviewed the history of the federal statute and concluded that its constitutionality had been impliedly recognized by the United States Supreme Court in *Michigan v. Tucker*.⁶² This conclusion may be accurate, but the issue is still unresolved, at least in Indiana.

⁵⁷384 U.S. 436 (1966).

⁵⁸18 U.S.C. § 3501 (1970).

⁵⁹IND. CODE § 35-5-5-1 (Burns 1975).

⁶⁰319 N.E.2d 868, 869-70 (Ind. Ct. App. 1974). See also *Larimer v. State*, 326 N.E.2d 277 (Ind. Ct. App. 1975).

⁶¹510 F.2d 1129, 1137 (10th Cir. 1975).

⁶²417 U.S. 433 (1974).

The *Cooley* case did, however, move in the direction of resolving another perplexing issue in Indiana concerning the admissibility of confessions. The court of appeals held that the state has the burden of proving the voluntariness of a confession by a preponderance of the evidence.⁶³ This conclusion followed the decision of the United States Supreme Court in *Lego v. Twomey*⁶⁴ in 1972 and made it clear that the court of appeals had intended to adopt this view in *Ramirez v. State*,⁶⁵ a case which was also decided in 1972 after the *Lego* decision. The court of appeals did not, however, refer to *Burton v. State*⁶⁶ which was decided in 1973 by the Indiana Supreme Court and included the statement that the state has the burden of proving voluntariness beyond a reasonable doubt.⁶⁷ Thus there is a clear conflict between the decision of the Indiana Supreme Court and the Indiana Court of Appeals, but the court of appeals did at least cite both the *Lego* decision and its own prior opinion in *Ramirez* as authority whereas the supreme court did not cite any authority whatever for its conclusion in *Burton*. It is possible that the precedent established in the *Winston* case, discussed above with reference to lineups, could be relied upon to justify the fact that the court of appeals decided to follow the United States Supreme Court rather than the Indiana Supreme Court, but the precedent is not exactly appropriate because here the Indiana Supreme Court stated its opinion on the issue over a year after the United States Supreme Court had decided the *Lego* case. The better justification probably is found in the fact noted above, that is, that the Indiana Supreme Court did not fully consider the issue in *Burton* and thus did not intend to make an authoritative statement concerning the burden of proof since it found in fact that the state had in that case met the heavy burden of proving the confession voluntary beyond a reasonable doubt.

The Third District Court of Appeals also issued another opinion during the past year concerning confessions that is of major significance in the area of juvenile affairs. In *Clemons v. State*,⁶⁸ the court held that the privilege against self-incrimination does not apply in juvenile waiver hearings and therefore a confession obtained illegally may be considered at the hearing. The court observed that guilt or innocence is not an issue at the waiver

⁶³319 N.E.2d at 870.

⁶⁴404 U.S. 477 (1972).

⁶⁵286 N.E.2d 219 (Ind. Ct. App. 1972), noted in Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 128 (1973).

⁶⁶260 Ind. 94, 292 N.E.2d 790 (1973).

⁶⁷*Id.* at 105, 292 N.E.2d at 797-98.

⁶⁸317 N.E.2d 859 (Ind. Ct. App. 1974).

hearing and that a confession, if considered at all, is to be considered only as it relates to the child's welfare and the best interests of the state. The court did note that the juvenile judge who hears such a confession at a waiver hearing probably should not thereafter be permitted to adjudicate the issue of delinquency if the waiver is denied.⁶⁹

2. Admissions

Tacit admissions are generally accepted in civil cases,⁷⁰ but their admissibility in criminal cases has been seriously questioned since the *Miranda* decision in 1966. During the past year, the Indiana Supreme Court decided two cases that indicate that tacit admissions may still be used in criminal cases, at least under limited circumstances. In *Robinson v. State*,⁷¹ the defendant was accused of battering her baby son to death. While a fireman was at the defendant's home after being called there to render emergency assistance, he overheard the defendant's mother say to the defendant, "You shouldn't have thrown the baby against the wall. You were beating him too hard." The fireman then heard the defendant say, "Shut up." The supreme court held that this conversation was admissible against the defendant as a tacit or "adoptive" admission. A similar result was reached in *Jethroe v. State*,⁷² a case in which the defendant was accused of murdering a woman with whom he had been living. During the trial, a daughter of the victim testified that she was in the house with the victim and the defendant when the victim called the defendant's mother on the telephone and said, "Jethroe said he is going to kill me before Friday." The daughter also testified that the defendant, Jethroe, then grabbed the telephone from the victim and told his mother not to come over to the house. This evidence was also found to be admissible as a tacit or "adoptive" admission. Neither opinion, however, gave any consideration to the effect of the *Miranda* decision on the admissibility of such tacit admissions in criminal cases. Some courts have clearly held that such tacit admissions must be excluded if any official or governmental action is involved in bringing the admissions about,⁷³ but the *Robinson* and *Jethroe* decisions are in accord with the conclusions of other courts

⁶⁹*Id.* at 866 n.12. The opinion also states that hearsay is admissible in a waiver hearing. *Id.* at 865.

⁷⁰*See, e.g.,* Springer v. Byrum, 137 Ind. 15, 36 N.E. 361 (1894); Pierce v. Goldsberry, 35 Ind. 317 (1871).

⁷¹317 N.E.2d 850 (Ind. 1974).

⁷²319 N.E.2d 133 (Ind. 1974).

⁷³*See* Commonwealth v. Dravec, 424 Pa. 582, 227 A.2d 904 (1967).

which would admit the evidence as long as there is no official involvement.⁷⁴

D. Self-Incrimination

1. Testimonial Compulsion

In *Frances v. State*,⁷⁵ the Indiana Supreme Court reaffirmed the view that the privilege against self-incrimination protects a person only against testimonial compulsion. The court observed that the privilege does not protect against "compulsory submission to purely physical tests such as fingerprinting, body measurements, handwriting and voice exemplars."⁷⁶ The court then held that a defendant could be compelled to undergo fingerprinting and that the defendant had no right to the presence of an attorney during such fingerprinting. This view was also followed by the Third District Court of Appeals which held in *Powell v. State*⁷⁷ that the trial court acted properly in ordering the defendant to submit to fingerprinting.

The First District Court of Appeals, however, has concluded that polygraph examinations are testimonial in nature and therefore the privilege against self-incrimination protects an accused from being required to submit to such an examination and prohibits a trial court from giving any consideration to the refusal of a defendant to submit to such an examination. In *McDonald v. State*,⁷⁸ the defendant testified in his own behalf in a nonjury trial and was asked by the trial judge if he would be willing to submit to a lie detector test. After a somewhat extended discussion between the judge and the parties to the trial, the defendant's attorney moved for a mistrial which was denied. The First District Court of Appeals reviewed the various Indiana cases concerning polygraph examinations and held that the trial judge's request was reversible error because it brought before the court the defendant's unwillingness to take the examination. In *Williams v. State*,⁷⁹ however, the First District Court of Appeals recognized that a defendant could properly waive his privilege against self-incrimination, and the court upheld the state's use of polygraph evidence on rebuttal after the defendant had raised an alibi defense. The decision is important because the waiver form signed by the defendant apparently concerned only the defendant's right to silence and right

⁷⁴See *United States v. Steel*, 458 F.2d 1164 (10th Cir. 1972); *Miller v. Cox*, 457 F.2d 700 (4th Cir. 1972).

⁷⁵316 N.E.2d 364 (Ind. 1974).

⁷⁶*Id.* at 366.

⁷⁷312 N.E.2d 521 (Ind. Ct. App. 1974).

⁷⁸328 N.E.2d 436 (Ind. Ct. App. 1975).

⁷⁹314 N.E.2d 764 (Ind. Ct. App. 1974).

to counsel and did not include an express waiver of any objections to the use of the test results at the trial. The decision thus appears to go beyond *Reid v. State*⁸⁰ in which the Indiana Supreme Court approved the use of such evidence on rebuttal after the defendant had expressly waived any objection to the use of the test results at the trial.

2. Grand Jury Testimony

Traditionally, criminal procedure has generally been developed in a case-by-case, after-the-fact process. Although this system has certain strengths and worthwhile features which have ensured its continuance,⁸¹ the Indiana Supreme Court attempted to overcome a major weakness in this system⁸² in issuing its landmark decision in *State ex rel. Pollard v. Criminal Court*.⁸³ In the *Pollard* case, the relators sought a writ of prohibition to prevent the trial court from enforcing an order requiring compliance with a grand jury subpoena duces tecum. The Indiana Supreme Court decided the narrow issue concerning jurisdiction in favor of the respondent trial court but decided that it was also "imperative" for the court to "delineate the trial court's functions vis-à-vis the exercise of the subpoena power by the prosecutor or the grand jury."⁸⁴ This the court undertook to do in an extensive opinion which reviewed the history of the grand jury and the subpoena power and then set forth a "code" of rules and procedures to be followed with reference to grand jury proceedings. The court first held that a subpoena duces tecum could be issued to prospective witnesses before a grand jury. It then held that the constitutional prohibitions against unreasonable searches and seizures are inapplicable to such subpoenas although the subpoenas must not be issued arbitrarily and are subject to a reasonableness requirement. Finally, the court recog-

⁸⁰259 Ind. 166, 285 N.E.2d 279 (1972). In *Austin v. State*, 319 N.E.2d 130 (Ind. 1974), the Indiana Supreme Court held that a witness improperly referred to a polygraph examination but that the error was not reversible under the circumstances. In *Hartman v. State*, 328 N.E.2d 445 (Ind. Ct. App. 1975), the Second District Court of Appeals held that the results of a polygraph test offered by the defendant were properly excluded because the proper foundation was not established by the defendant.

⁸¹The case-by-case process emphasizes that an actual controversy must exist before a court will develop a procedure in lieu of legislative action and helps to ensure that adequate attention and consideration are given to a particular controversy before a new procedure is established.

⁸²A major weakness, if not *the* major weakness, in the system is its after-the-fact nature which requires litigants to speculate on what procedural rule may thereafter be adopted by the court and results in a haphazard development of procedural rules rather than a unified code of rules.

⁸³329 N.E.2d 573 (Ind. 1975).

⁸⁴*Id.* at 578.

nized that the privilege against self-incrimination applies to grand jury proceedings and set forth a number of rules to effectuate this privilege. Under these new rules, all witnesses appearing before a grand jury must be fully advised of their rights protected by the privilege; all witnesses must be advised of the general nature of the grand jury investigation, and this information must be contained in the subpoena; a witness who has already been charged with an offense or is a "target" defendant does not have to respond or comply with a subpoena to testify or a subpoena duces tecum; a witness who has already been charged or who is a "target" defendant must be advised in the subpoena of his right to the assistance of counsel in deciding whether to comply with the subpoena; a witness who appears before a grand jury and becomes a "target" defendant or a subject of the investigation must be fully advised of this fact; ordinary witnesses who are not subjects of the investigation must claim their privilege as to each question deemed incriminating; all possible questions are to be submitted to ordinary witnesses before the court is asked to review any claims under the privilege so that the review will not be "piecemeal"; and the court's review of such claims of privilege is to be conducted in a hearing *in camera*.

3. Immunity

Although immunity was discussed to some extent in the *Pollard* case, the Indiana Supreme Court did not discuss this subject fully and thus did not resolve a number of questions that still exist concerning immunity. Indiana's immunity statute was enacted during the 1969 session of the Indiana General Assembly and provides that a witness may be required to testify or produce evidence, provided that "he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced."⁸⁵ This statute has embodied language that is drawn in part from a "transactional" immunity statute, but the literal wording of the statute appears to make it more nearly akin to a "use" immunity statute. In the *Pollard* case, the court quoted the statute and discussed it to some extent but did not clearly indicate whether the statute is to be considered as a "transactional" or as a "use" statute. The court stated that "the prosecutor may secure the testimony or evidence protected by the constitutional privilege by extending to the witness an immunity which is coextensive with the privilege being relinquished."⁸⁶ In support of this statement,

⁸⁵IND. CODE § 35-6-3-1 (Burns 1975).

⁸⁶329 N.E.2d at 591.

the court cited *Kastigar v. United States*⁸⁷ in which the United States Supreme Court held that a grant of use and derivative use immunity would be coextensive with the privilege under the Federal Constitution.

If the Indiana court had stopped at this point, it would appear that the Indiana statute is to be construed as a "use" statute. The court, however, cited its own earlier decision in *Overman v. State*⁸⁸ which contains language that appears to support a requirement of transactional immunity. Furthermore, the court expressed the view that the Indiana statute is similar to the Model State Witness Immunity Act⁸⁹ and is in fact "patterned after" that act.⁹⁰ If this is correct, then it should be noted that the drafters of the Model Act appear to have contemplated "transactional" rather than "use" immunity.⁹¹ The difficulty with this view, however, is that the drafters of the Indiana statute left out of the statute certain critical words that appear in the Model Act. As noted above, the Indiana statute provides that a witness "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced."⁹² On the other hand, the Model Act provides that the witness "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence."⁹³ The Model Act follows the standard language used in transactional statutes,⁹⁴ prohibiting any prosecution for offenses to which the testimony relates, whereas the Indiana statute appears to permit prosecutions for any offenses whatever, so long as they are not instituted "because of" any testimony given. If this latter interpretation of the Indiana statute is correct, then the statute would appear to be more nearly in the nature of a "use" immunity statute than a "transactional" statute.

The matter of immunity was also considered briefly by the Second District Court of Appeals in *Hartman v. State*.⁹⁵ In *Hartman*, the defendant argued that the charges against him should

⁸⁷406 U.S. 441 (1972).

⁸⁸194 Ind. 483, 143 N.E. 604 (1924).

⁸⁹MODEL STATE WITNESS IMMUNITY ACT (1957).

⁹⁰329 N.E.2d at 591.

⁹¹See MODEL STATE WITNESS IMMUNITY ACT, Commissioners' Prefatory Note 6 (1957).

⁹²IND. CODE § 35-6-3-1 (Burns 1975).

⁹³MODEL STATE WITNESS IMMUNITY ACT § 1 (1957).

⁹⁴Compare Act. of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745 (repealed 1970) (a federal "transactional" statute), with 18 U.S.C. § 6002 (1970) (a "use" immunity statute).

⁹⁵328 N.E.2d 445 (Ind. Ct. App. 1975).

have been dropped because the state had agreed to drop the charges if he would take and pass a polygraph test. If the court of appeals had sustained this argument, it would have established a precedent for the granting of immunity by a prosecutor apart from the statutory procedure discussed above. The court did not reach the issue, however, because it found that the defendant had failed to present evidence to the trial court that such an agreement existed. On the other hand, the court of appeals did observe that the proper procedure for asserting immunity with respect to a crime charged is to file a motion to dismiss either before or during the trial.⁹⁶

E. Discovery

Just as the Indiana Supreme Court attempted to set forth a "code" of rules concerning grand jury proceedings in the *Pollard* case discussed above, the court also "attempted to set forth general principles concerning discovery procedure as a guide for the trial courts of this state" in the landmark case of *State ex rel. Keller v. Criminal Court*.⁹⁷ In that case, the trial court issued a wide-ranging pretrial discovery order that required extensive disclosure by both the prosecution and the defendant. Both parties sought writs of prohibition with reference to the discovery order, and the Indiana Supreme Court denied both petitions. The state was thus required to provide names and addresses of prospective witnesses, pretrial statements of such witnesses, transcripts of any grand jury testimony of such witnesses, statements of the defendant, reports of experts, real and documentary evidence to be used at the trial, and criminal records of any prospective witnesses. Likewise, the defendant was required to notify the state of any defenses which he intended to raise and to provide the state with names and addresses of prospective witnesses, pretrial statements of such witnesses,⁹⁸ reports of experts, real and documentary evidence to be used at the trial, and criminal records of any prospective witnesses. The defendant was also, at the request of the state, required to appear in a lineup, provide identification evidence, and submit to physical or medical examinations. The Indiana Supreme Court concluded that none of these requirements violated the defendant's constitutional rights and that the trial court had inherent

⁹⁶See IND. CODE § 35-3.1-1-4 (Burns 1975).

⁹⁷317 N.E.2d 433, 438 (Ind. 1974).

⁹⁸This part of the discovery order is supported to some extent by the decision of the United States Supreme Court which held in *United States v. Nobles*, 422 U.S. 225 (1975), that the prosecution was entitled, at least during the trial, to inspect a pretrial statement of a defense witness for purposes of cross-examination.

authority to require both the state and the defendant to provide such pretrial discovery so long as the trial court balanced the right to discovery by providing for reciprocity on both sides. Unfortunately, the court did not fully define "reciprocity" and thus did not clearly decide whether a trial court could grant a request of the prosecution for discovery even if the defendant had not made a request for such discovery. The opinion does, however, emphasize the inherent authority of a trial court to order discovery and here the trial court apparently ordered the discovery without regard to a request from either side. Thus it appears logical to conclude that a request for discovery by the state may be granted so long as the trial court makes certain that the defendant may also, if desired, have similar discovery.

An additional rule concerning discovery was also fashioned and announced by the Indiana Supreme Court in *Birkla v. State*.⁹⁹ In that case, the defendant's co-accused was taken from the county jail and was permitted to visit with his wife in an interrogation room at the police station. Without their knowledge, their actions and conversations were recorded by a video camera and microphone. Thereafter, the prosecutor was informed by the police that the videotape had been made. The prosecutor immediately advised the police that the tape could not be used and then viewed it for evidence that might exculpate the defendant or the co-accused. Finding no exculpatory evidence, he had the tape erased by a detective. The defendant's attorney later learned about the tape while interviewing the co-accused's wife and filed a motion for production of the tape. He then moved to dismiss the charges and sought to prevent the state from calling the co-accused's wife as a witness for the state. Both of these motions were denied. The supreme court affirmed this action of the trial court and then stated that a prosecutor who decides to destroy evidence deemed by him to be nonmaterial has a heavy burden to disprove prejudice to the defendant if the destruction occurs before the defendant's attorney is advised of the evidence. The court stated that the prosecution should consider the seriousness of the charge involved, the possible relevance of the evidence to the issue of guilt or punishment, and the possible use of the evidence by the defendant for rebuttal or impeachment, and then should retain the evidence if there is any doubt about its possible materiality. The rule was made prospective, however, and thus the burden of proving materiality and prejudice in this case was placed upon the defendant.¹⁰⁰

⁹⁹323 N.E.2d 645 (Ind. 1975).

¹⁰⁰In discussing this new rule of discovery, the court also made the observation that a prosecutor's duty to disclose exculpatory evidence under Brady

F. Guilty Pleas

Although the Indiana procedure concerning guilty pleas has been codified and in statutory form since the 1973 session of the Indiana General Assembly,¹⁰¹ the cases considered by the Indiana appellate courts during the past year generally continued to involve guilty pleas entered prior to the enactment of the statutory procedure. One case, however, did involve a guilty plea entered after the enactment of the statute, and the decision suggests that the court of appeals and the supreme court may be in disagreement concerning at least one provision of the new statute. In *Garcia v. State*,¹⁰² the trial court accepted the defendant's guilty plea without first fully advising him of his rights as required by the statutory procedure. Thereafter, a hearing was held on the defendant's motion to withdraw his guilty plea and the attorney who represented him at the guilty plea hearing testified that he had personally advised the defendant concerning his constitutional rights. The Third District Court of Appeals ultimately held that the trial court should have set the plea aside because the attorney had not fully advised the defendant concerning his right of confrontation and the duty of the state to prove his guilt beyond a reasonable doubt. The opinion is of more importance, however, because of the court's interpretation of the statute which specifically requires the judge to advise the defendant personally of his rights before accepting a guilty plea.¹⁰³ The court of appeals held that it was error for the judge not to give the advice personally but suggested that this should not be reversible error since a defendant presumably could not show any prejudice if the record clearly reflected a proper advice of rights by his attorney. In so doing, the court of appeals relied on the recent decision of the Indiana Supreme Court in *Williams v. State*.¹⁰⁴ In *Williams*, the supreme court did hold that the advice-of-rights requirement could be satisfied by action of the defendant's attorney, but that case involved a guilty plea entered prior to the effective date of the new Indiana statute. In fact the court referred to the date involved and stated in a footnote that if the "statutory standard had been applicable at the time of petitioners' pleas, and if the record was identical to the one before us, petitioners would undoubtedly have pre-

v. Maryland, 373 U.S. 83 (1963), does not arise until the defendant makes a request for production. The court noted that *Brady* did not apply here because the tape was erased before the defendant's motion to produce was filed.

¹⁰¹IND. CODE §§ 35-4.1-1-2 to -6 (Burns 1975).

¹⁰²326 N.E.2d 822 (Ind. Ct. App. 1975).

¹⁰³IND. CODE § 35-4.1-1-3 (Burns 1975).

¹⁰⁴352 N.E.2d 827 (Ind. 1975).

sented a solid case for post-conviction relief.”¹⁰⁵ The court of appeals referred to this footnote but concluded that the failure of a judge to give the advice should not be reversible error since a defendant could not show any prejudice even after the enactment of the statute if his attorney has properly advised him of his rights.¹⁰⁶ Despite this conclusion, the same court of appeals noted in *Wyatt v. State*¹⁰⁷ that the preferable practice is for the trial court to give the advice of rights personally and that this practice is now mandated by the new statute.

The Indiana Supreme Court and the Indiana Court of Appeals were also in disagreement during the past year concerning the nature of the sentence that may be imposed following the granting of a new trial by way of post-conviction relief. In *Ballard v. State*,¹⁰⁸ the defendant was charged with robbery, first degree burglary, and automobile banditry. As a result of plea negotiations, the various charges were dismissed and the defendant entered a plea of guilty to second degree burglary. After beginning to serve a two to five year sentence for the second degree burglary conviction, the defendant filed a petition to withdraw his guilty plea. The plea was set aside, but the state then reinstituted the robbery charge and the first degree burglary charge. After a trial and conviction on both charges, the defendant was sentenced to serve ten to twenty-five years for the robbery conviction and two to five years on the first degree burglary charge. The Second District Court of Appeals affirmed this action of the trial court,¹⁰⁹ but the supreme court reversed and held that the defendant could only be sentenced to serve concurrent terms of two to five years on each of the charges. The supreme court recognized that this decision resulted in an “injustice” to the state of Indiana, but it emphasized that the state should not accept a guilty plea unless satisfied that the penalty to be imposed is sufficient for all of the defendant’s related offenses. The court also observed that plea bargaining is “a highly questionable practice at its best” and then asserted that the state, in the absence of compelling circumstances, “should not accept pleas of guilty to relatively minor offenses in satisfaction of charges of serious crimes supported by clear and convincing evidence of guilt.”¹¹⁰ This appears to be the first time that the Indiana Supreme Court has questioned the practice of plea bargaining and may reflect a change in the views of the court

¹⁰⁵*Id.* at 835 n.1.

¹⁰⁶326 N.E.2d at 823.

¹⁰⁷328 N.E.2d 450, 454 (Ind. Ct. App. 1975).

¹⁰⁸318 N.E.2d 798 (Ind. 1974).

¹⁰⁹309 N.E.2d 817 (Ind. Ct. App. 1974).

¹¹⁰318 N.E.2d at 810.

members since the recent approval of plea bargaining by both the the Indiana Supreme Court¹¹¹ and the United States Supreme Court.¹¹²

Finally, the Indiana Supreme Court and the First District Court of Appeals did agree during the past year that a defendant may enter a guilty plea, after being fully advised of his rights, even though he either then or thereafter denies his guilt and protests his innocence. In *Campbell v. State*,¹¹³ the defendant entered a plea of guilty to second degree murder, but the court rejected the plea when the defendant said that he did not know if he had committed the murder and was pleading guilty "just to get it over with." Thereafter, the defendant persisted in his effort to plead guilty and said that he had no memory of the crime because he was drunk at the time. The court then decided to hear evidence concerning the crime, including testimony of eyewitnesses, and finally accepted the plea. When the defendant later attempted to withdraw his plea, his petition was denied. This decision was affirmed by the supreme court which relied on the fact that the defendant was fully advised of his rights, he was represented by counsel, and the evidence supported his plea. A similar conclusion was reached in *King v. State*¹¹⁴ by the First District Court of Appeals. In that case, the defendant entered a plea of guilty to robbery but later argued that the plea should be set aside because his testimony and the testimony of the victim at the guilty plea hearing showed that he was not guilty of the offense. The court of appeals concluded that the evidence was in fact sufficient to show the defendant's guilt and that the plea was properly accepted despite the defendant's subsequent protestations of innocence. The defendant had been fully advised of his rights at the hearing, he was represented by counsel, and the victim's statement was sufficient to support the plea regardless of the defendant's own subjective motivation behind the plea.¹¹⁵

¹¹¹Dube v. State, 257 Ind. 398, 275 N.E.2d 7 (1971).

¹¹²Santobello v. New York, 404 U.S. 257 (1971).

¹¹³321 N.E.2d 560 (Ind. 1975).

¹¹⁴314 N.E.2d 805 (Ind. Ct. App. 1974).

¹¹⁵The voluntariness of a guilty plea was also considered in a number of other appellate decisions during the past year, including *Lamb v. State*, 325 N.E.2d 180 (Ind. 1975) (a defendant must raise all available grounds for relief in his first post-conviction relief petition and is barred from raising them in a subsequent petition); *Brooks v. State*, 316 N.E.2d 688 (Ind. Ct. App. 1974) (a plea of guilty to manslaughter was not involuntary even though the defendant was charged with murder and felony murder in a two count indictment); *Pettyjohn v. State*, 315 N.E.2d 729 (Ind. Ct. App. 1974) (a plea of guilty to manslaughter is not involuntary even if entered because of fear that the defendant might be convicted of murder and be sentenced to death); *Baurle v. State*, 314 N.E.2d 825 (Ind. Ct. App. 1974) (a plea of guilty was

G. Assistance of Counsel

1. Right to Counsel

A defendant's right to the assistance of counsel was reviewed at length in *Collins v. State*,¹¹⁶ and the Third District Court of Appeals concluded that the right under article 1, section 13 of the Indiana Constitution is coextensive with the right under the sixth amendment to the Federal Constitution.¹¹⁷ The court expressed approval of the recommendation of the American Bar Association that counsel should be provided for an accused "as soon as feasible" after he is taken into custody¹¹⁸ but concluded that a defendant does not have an absolute constitutional right to the assistance of counsel prior to the time of arraignment to advise him concerning his speedy trial rights. The court did observe that it is "settled" that a defendant has the right to counsel at an arraignment,¹¹⁹ although the Indiana Supreme Court had held six months earlier in *Moore v. State*¹²⁰ that the denial of an attorney at a preliminary hearing could not be raised by a defendant subsequent to his conviction unless the absence of counsel in some way resulted in the denial of due process during the defendant's trial.

In *Berwanger v. State*,¹²¹ the Indiana Supreme Court disagreed with the Second District Court of Appeals and held that a defendant must be given the right to counsel during an examination under the Criminal Sexual Deviancy Act.¹²² The court of appeals had held that a defendant's attorney could not be excluded from the examination but that the state's failure to give notice to the defendant's attorney would not be considered reversible error so as to nullify the examination and any subsequent proceedings.¹²³ Although the decision of the court of appeals has now been reversed on this issue, the supreme court did not comment on another equally important part of the decision, in which the court of appeals asserted that a defendant has "no constitutional right to have counsel present at an examination by court appointed physicians to determine one's mental capacity or state of aberration."¹²⁴ Since the

not involuntary even though the trial court assured the defendant he would begin serving his sentence on a certain date and the parole board thereafter delayed the beginning date for the sentence).

¹¹⁶321 N.E.2d 868 (Ind. Ct. App. 1975).

¹¹⁷*Id.* at 872 n.4.

¹¹⁸ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 5.1 (1967).

¹¹⁹321 N.E.2d at 872.

¹²⁰312 N.E.2d 485 (Ind. 1974).

¹²¹315 N.E.2d 704 (Ind. 1974).

¹²²IND. CODE §§ 35-11-3.1-1 *et seq.* (Burns 1975).

¹²³307 N.E.2d 891, 895 (Ind. Ct. App. 1974).

¹²⁴*Id.* at 894.

supreme court considered only the sexual deviancy statute and purported to base its decision on the express language of that statute,¹²⁵ the opinion expressed by the court of appeals concerning other mental examinations would still appear to be valid.

During the past year, the Indiana Supreme Court also considered a defendant's right to represent himself in what may be a landmark decision. In *Adams v. State*,¹²⁶ the trial court denied the defendant's request to permit the defendant instead of his attorney to make the final argument to the jury. On appeal, the defendant argued that article 1, section 13 of the Indiana Constitution guaranteed him the right to be heard by himself and his attorney. This contention was rejected by the supreme court which held that the trial court had the discretion to decide whether the defendant or his attorney should give the final argument. In so doing, however, the court recognized that a defendant has an unqualified right to act as his own attorney if he invokes this right prior to the beginning of his trial and that this right is limited only if the defendant does accept the services of an attorney when the trial begins.¹²⁷ This decision thus foreshadowed and is in accord with the recent opinion of the United States Supreme Court which held in *Faretta v. California*¹²⁸ that a defendant has a right under the Federal Constitution to represent himself in both federal and state court proceedings.

2. Effectiveness of Counsel

The Indiana appellate courts have continued to apply the standard test that an attorney is presumed to be competent and that the presumption can be overcome only by strong and convincing proof that the attorney's actions or inactions rendered the proceedings a mockery of justice and shocking to the conscience of the court.¹²⁹ In view of this standard, the courts have consistently declined to review the trial tactics and decisions of defense attorneys. During the past year, the courts held that the failure of a defense attorney to raise specific defenses,¹³⁰ to call particular wit-

¹²⁵315 N.E.2d at 706.

¹²⁶314 N.E.2d 53 (Ind. 1974).

¹²⁷*Id.* at 59.

¹²⁸95 S. Ct. 2525 (1975).

¹²⁹*Baker v. State*, 319 N.E.2d 344 (Ind. 1974); *Cross v. State*, 316 N.E.2d 685 (Ind. Ct. App. 1974); *King v. State*, 314 N.E.2d 805 (Ind. Ct. App. 1974); *Kindle v. State*, 313 N.E.2d 721 (Ind. Ct. App. 1974).

¹³⁰*Lockhart v. State*, 324 N.E.2d 811 (Ind. 1975) (failure to place defendant on the witness stand to claim self-defense); *Maxwell v. State*, 319 N.E.2d 121 (Ind. 1974) (failure to present evidence of insanity and self-defense); *Berry v. State*, 321 N.E.2d 571 (Ind. Ct. App. 1975) (failure to give

nesses,¹³¹ to object to the admissibility of particular evidence,¹³² or to poll the jury¹³³ did not establish that the attorney was incompetent or had rendered ineffective assistance to his client. The same standard was relied on by the courts in rejecting arguments concerning the time devoted by counsel to pretrial preparation¹³⁴ and decisions made by counsel concerning issues to be raised on appeal.¹³⁵ The Second District Court of Appeals also specifically relied upon this standard in holding that the joint representation of two co-defendants did not necessarily result in the ineffective assistance of counsel.¹³⁶

In *Bimbow v. State*,¹³⁷ the Second District Court of Appeals was called upon to explore the right of a defendant to have experts employed at public expense to assist his counsel in preparing for trial. In the *Bimbow* case, the defendant entered a plea of insanity and was examined by two court-appointed psychiatrists. The defendant then filed a motion asking the trial court to authorize him to employ two additional psychiatrists of his own choosing at state expense, but this motion was denied. The court of appeals

notice of alibi defense); *Brooks v. State*, 316 N.E.2d 688 (Ind. Ct. App. 1974) (failure to raise alibi defense).

¹³¹*Foster v. State*, 320 N.E.2d 745 (Ind. 1974) (failure to object to an alibi witness).

¹³²*Id.* (failure to object to the admissibility of a rifle); *Robertson v. State*, 319 N.E.2d 833 (Ind. 1974) (failure to object to the admissibility of a picture of the defendant).

¹³³*Robertson v. State*, 319 N.E.2d 833 (Ind. 1974).

¹³⁴*Colvin v. State*, 321 N.E.2d 565 (Ind. 1975) (appointment of counsel one day before guilty plea); *Sturgeon v. State*, 325 N.E.2d 225 (Ind. Ct. App. 1975) (entry of guilty plea nine days after arrest); *Daniels v. State*, 312 N.E.2d 890 (Ind. Ct. App. 1974) (minimal consultation with defendant prior to trial); *Short v. State*, 312 N.E.2d 144 (Ind. Ct. App. 1974). In *Richardson v. State*, 319 N.E.2d 644 (Ind. Ct. App. 1974), the court applied this standard in rejecting the argument that an appointed public defender was unable to prepare adequately because of the heavy caseload that he was handling at the time.

¹³⁵*Greer v. State*, 321 N.E.2d 842 (Ind. 1975) (a post-conviction petition which attempts to raise issues waived on appeal impliedly alleges incompetent representation by the appellate attorney); *Meyers v. State*, 321 N.E.2d 201 (Ind. 1975) (failure of appellate counsel to prosecute appeal). A different standard may be developing, however, with regard to an appointed public defender who fails to raise an issue on appeal after being specifically requested to do so by the defendant. See *Simmons v. State*, 310 N.E.2d 872 (Ind. 1974); *Hendrixson v. State*, 316 N.E.2d 451 (Ind. Ct. App. 1974); *Dixon v. State*, 152 Ind. App. 430, 284 N.E.2d 102 (1972).

¹³⁶*Melendez v. State*, 312 N.E.2d 508, 511-12 (Ind. Ct. App. 1974). Similar conclusions were reached by the Indiana Supreme Court in *Stoechr v. State*, 328 N.E.2d 422 (Ind. 1975), and *Martin v. State*, 314 N.E.2d 60 (Ind. 1974), but the court did not clearly indicate what standard was being followed in determining the lack of prejudice to the defendants concerned.

¹³⁷315 N.E.2d 738 (Ind. Ct. App. 1974).

held that there was no requirement for the state to appoint more than two psychiatrists to testify at the trial and that the defendant had not shown any prejudice resulting from the failure to authorize the appointment of psychiatrists to assist in the preparation of his defense. The court concluded that the defendant had no general right to such services although it apparently did recognize the right of a defendant to obtain such services when prejudice would otherwise occur. The opinion is also important because of the suggestion in the concluding paragraph that the court would follow the same rule with reference to a defendant's request for the services of investigators or of other experts.¹³⁸

H. Defenses

A wide variety of defenses were considered by the Indiana appellate courts during the past year, with several opinions concerning defenses being issued by each of the districts of the court of appeals and by the supreme court. Entrapment appeared to be the most popular defense, being considered by each of the appellate courts. Self-defense was a close second, being considered by the supreme court and two of the districts of the court of appeals. In addition, opinions were issued by the various courts concerning the defenses of insanity, coercion, alibi, double jeopardy, and collateral estoppel.

1. Entrapment

The First District Court of Appeals led the way in developing the entrapment defense during the past year by issuing four major opinions on the subject, including *Locklayer v. State*¹³⁹ which presents a thorough analysis of the defense as it appears to be developing in Indiana. In the *Locklayer* case, the court of appeals concluded that officers must have "probable cause to suspect" that a person is engaged in illegal activity before "baiting a trap" for that person and that the existence of such "probable cause to suspect" is an issue for the judge to decide rather than a matter of fact for the jury's determination. Since the issue is for the judge to decide, the lack of probable cause can be raised by a pretrial motion to suppress or by an objection to the admissibility of evidence at the trial. On the other hand, the court recognized the general view that entrapment is a matter of de-

¹³⁸*Id.* at 744. The opinion concludes at this point with the following quotation from *Corpus Juris Secundum*: "It has been held that there is no constitutional right, or no right in absence of statute, to have furnished, at public expense, the services of investigators, or the services of experts, including psychiatrists." 23 C.J.S. *Criminal Law* § 982(8), at 291 (Supp. 1974).

¹³⁹317 N.E.2d 868 (Ind. Ct. App. 1974).

fense going to the merits of the charge against a defendant and thus is a factual matter to be resolved by the jury. These views are reflected in *Hauk v. State*¹⁴⁰ and *Kramer v. State*¹⁴¹ but the court also held in those cases that officers do not need to have "the probable cause to suspect" at the outset of an investigation but must have such information by the time of the transaction which is arranged by the officers. Finally, the court held in *Releford v. State*¹⁴² that entrapment need not be pleaded separately as a defense but is waived if not properly raised in the trial court. The court concluded that the defense is not one that may be raised for the first time on appeal under the "fundamental error" doctrine.

These views were generally followed in the three opinions of the other two districts of the court of appeals during the past year, but each of these opinions also involved the "third party" rule.¹⁴³ According to that rule, there is no issue of entrapment when an officer approaches a suspect to make a buy of narcotics and that suspect in turn takes the officer to a "third person" who then makes the sale and is arrested. The only opinion of the Indiana Supreme Court during the past year concerning entrapment was *Kelley v. State*,¹⁴⁴ and it consisted of a denial of a petition to transfer the *Kelley* case from the Third District Court of Appeals. In accordance with its customary practice, the court did not file an opinion in connection with the denial of transfer, but a dissenting opinion was filed in opposition to the "third party" rule.

2. Self-Defense

A statute¹⁴⁵ enacted in 1971 by the Indiana General Assembly showed promise of giving major impetus to the defense of self-defense, especially after its initial review by the Third District Court of Appeals,¹⁴⁶ but the Indiana Supreme Court finally resolved the ambiguities in the statute by holding in *Loza v. State*¹⁴⁷ that the statute neither created a new remedy nor altered the procedures concerning self-defense in any aspect. The statute provided that no person "shall be placed in legal jeopardy of any kind whatsoever" for acting in self-defense.¹⁴⁸ The defendant argued

¹⁴⁰312 N.E.2d 92, 98 (Ind. Ct. App. 1974).

¹⁴¹317 N.E.2d 203, 208 (Ind. Ct. App. 1974).

¹⁴²325 N.E.2d 214 (Ind. Ct. App. 1975).

¹⁴³*Telfare v. State*, 324 N.E.2d 270 (Ind. Ct. App. 1975) (second district); *Fischer v. State*, 312 N.E.2d 904 (Ind. Ct. App. 1974) (third district); *Kelley v. State*, 315 N.E.2d 382 (Ind. Ct. App. 1974) (third district).

¹⁴⁴324 N.E.2d 158 (Ind. 1975).

¹⁴⁵IND. CODE § 35-13-10-1 (IND. ANN. STAT. § 9-2412, Burns Supp. 1975).

¹⁴⁶*Loza v. State*, 316 N.E.2d 678 (Ind. Ct. App. 1974).

¹⁴⁷325 N.E.2d 173 (Ind. 1975).

¹⁴⁸IND. CODE § 35-13-10-1 (IND. ANN. STAT. § 9-2412, Burns Supp. 1975).

that he should be able to plead self-defense prior to trial and obtain a discharge by showing that he acted in self-defense. The court of appeals agreed with this contention and held that the defendant's motion for discharge should have been granted since the state did not respond to the motion and contradict the defendant's allegations that he acted in self-defense. The court thus concluded that the issue of self-defense could be ruled on as by a motion for summary judgment when the facts were not in dispute but would have to be tried before a jury if the state contradicted the defendant's version of the facts in any way.¹⁴⁹ The supreme court rejected this view because it believed that every claim of self-defense necessarily involves a material issue of fact since the defense deals with the defendant's state of mind and the reasonableness of his actions. It thus rejected the right of the defendant to raise the issue of self-defense in a pretrial hearing and concluded that the statute merely constituted a "legislative declaration of the public policy of the state."¹⁵⁰

The general elements of self-defense were reviewed and restated by the Indiana Supreme Court in *Jennings v. State*,¹⁵¹ but the court's opinion created some uncertainty about the burden of proof in such cases. The court stated that the defendant's evidence may have been sufficient to show that he was in apparent danger of death or great bodily harm but that "a review of the evidence indicates that defendant failed to establish the other requisite elements of self-defense."¹⁵² The court then reviewed the evidence concerning the other two elements of self-defense, that the defendant acted without fault and was in a place where he had a right to be, and held that the evidence supported the jury's conclusion "that defendant failed to prove that he was without fault" and the finding that the defendant's criminal actions "curtailed" his right to be at the scene of the crime.¹⁵³ Although the court thereafter observed that the burden was on the state to prove beyond a reasonable doubt that the defendant killed the decedent and that the killing was done purposely and maliciously, there was no direct statement that the state had the burden of disproving self-defense beyond a reasonable doubt. As a result, the Second District Court of Appeals was promptly called upon to resolve the ambiguity created by the language in this opinion. In *Woods v. State*,¹⁵⁴ the court of appeals held that the state does have the burden of proving

¹⁴⁹316 N.E.2d at 683.

¹⁵⁰325 N.E.2d at 176.

¹⁵¹318 N.E.2d 358 (Ind. 1974).

¹⁵²*Id.* at 360.

¹⁵³*Id.*

¹⁵⁴319 N.E.2d 688 (Ind. Ct. App. 1974).

beyond a reasonable doubt that the defendant did not act in self-defense but only after the defendant has "come forward with evidence" to raise a reasonable doubt upon the issue of self-defense.¹⁵⁵ The court did observe, however, that the defendant would not necessarily have this burden of going forward in all cases since the state's own evidence might disclose the issue of self-defense. Having resolved the ambiguity concerning the burden of proof, the court of appeals then decided that it was not error for the trial court to refuse a specific instruction tendered by the defense concerning such a burden. It held that there was no precedent requiring such an instruction and that the burden on the issue of self-defense was properly covered by the general instruction concerning the state's burden of proof.¹⁵⁶

3. *Insanity*

Once the concept of two-stage trials was accepted by the Indiana Supreme Court, it was only a matter of time until the court was asked to extend the concept from habitual offender cases¹⁵⁷ to cases involving a plea of insanity. The issue was before the Indiana Supreme Court on two occasions during the past year, and the court decided that there is no automatic right to a two-stage trial in insanity cases but left open the possibility that a defendant might obtain such a trial under proper circumstances. In *Hester v. State*,¹⁵⁸ the defendant requested a bifurcated trial and stated that it was necessary because he could not remember what occurred at the time of the alleged offense. The Indiana Supreme Court held that there is no constitutional right to a bifurcated trial in insanity cases but observed that the Indiana rules of procedure "would authorize a bifurcated trial upon such issues, in a proper case."¹⁵⁹ The court referred to Trial Rules 42(B) and 42(C) which authorize such trials when necessary "to avoid prejudice" or "for good cause shown" and concluded that the defendant's "alleged reason for requesting the two-stage trial" was not sufficient to show "probable and substantial prejudice" requiring such a trial.¹⁶⁰ This decision was followed shortly thereafter in *Sexton v.*

¹⁵⁵*Id.* at 693. See also *Marine v. State*, 301 N.E.2d 778 (Ind. Ct. App. 1973).

¹⁵⁶The issue of self-defense was also raised in *Williams v. State*, 316 N.E.2d 354 (Ind. 1974), and *Scruggs v. State*, 317 N.E.2d 807 (Ind. Ct. App. 1974). Both cases emphasized that self-defense is an issue for the trier of fact and that the evidence is to be considered from the defendant's viewpoint.

¹⁵⁷See *Lawrence v. State*, 259 Ind. 306, 286 N.E.2d 830 (1972).

¹⁵⁸315 N.E.2d 351 (Ind. 1974).

¹⁵⁹*Id.* at 353.

¹⁶⁰*Id.*

State,¹⁶¹ but the latter opinion contains only a citation to *Hester* for authority without any discussion of the reason for the defendant's request or the reason for the denial of the request.¹⁶²

4. Other Defenses

Coercion was recognized as a defense by the Third District Court of Appeals in *Hood v. State*,¹⁶³ a case involving an attempted armed robbery. The defendant alleged that he participated in the robbery only because two men had abducted him and his fiancée and had threatened to kill his fiancée if he did not commit the robbery. The court of appeals agreed that coercion or duress could be a defense but held that the jury was justified in rejecting the defense. The Third District Court of Appeals also held in *Dockery v. State*¹⁶⁴ that testimony concerning an alibi was properly excluded because the defendant had failed to give the required advance notice.¹⁶⁵

The defense of former jeopardy was considered in *Beard v. State*¹⁶⁶ by the Second District Court of Appeals which stated by way of dicta, that the "burden of proof is upon the defendant in establishing a defense of former jeopardy."¹⁶⁷ In support of this statement, the court cited *Ford v. State*,¹⁶⁸ but the Indiana Supreme Court stated in the *Ford* case that a defendant has "the duty of going forward with the proof to sustain his defense of former jeopardy."¹⁶⁹ Thus the *Beard* opinion contains an ambiguity that is similar to the one discussed above with reference to the *Jennings* case and the insanity defense.

Two decisions of the Indiana Supreme Court during the past year also suggest that the court may be developing a doctrine of collateral estoppel to supplement the defense of former jeopardy. In *Johnson v. State*,¹⁷⁰ the defendant was originally charged in the Marion Municipal Court with the offense of robbery. Thereafter,

¹⁶¹319 N.E.2d 829 (Ind. 1974).

¹⁶²The defense of insanity was also considered in *Faught v. State*, 319 N.E.2d 843 (Ind. Ct. App. 1974), by the First District Court of Appeals which reaffirmed the view that evidence of drug addiction may be considered on the issue of insanity but that drug addiction itself is not a defense. The Second District Court of Appeals also held in *Bimbow v. State*, 315 N.E.2d 738 (Ind. Ct. App. 1974), that a defendant is not entitled to have court-appointed psychiatrists of his own choosing to assist in the preparation of his defense.

¹⁶³313 N.E.2d 546 (Ind. Ct. App. 1974).

¹⁶⁴317 N.E.2d 453 (Ind. Ct. App. 1974).

¹⁶⁵IND. CODE § 35-5-1-1 (Burns 1975).

¹⁶⁶327 N.E.2d 629 (Ind. Ct. App. 1975).

¹⁶⁷*Id.* at 631.

¹⁶⁸229 Ind. 516, 98 N.E.2d 655, *cert. denied*, 342 U.S. 873 (1951).

¹⁶⁹*Id.* at 520, 98 N.E.2d at 656.

¹⁷⁰313 N.E.2d 535 (Ind. 1974).

the defendant was charged in the Marion Criminal Court with robbery and armed robbery. Eventually, the defendant was tried on charges of robbery and inflicting injury in the commission of a robbery. The Indiana Supreme Court first held that the six month limitation under Criminal Rule 4(A) began to run from the date of the charge filed in the Marion Municipal Court rather than from the date of the charges filed in the Criminal Court. The court then held that the original charge of robbery was barred because more than six months had elapsed by the time of the defendant's trial. The court also held that the charge of inflicting injury in the commission of a robbery, although tried within six months of being filed, was likewise barred because it was filed after the six-month period had run on the robbery offense and because the robbery offense was an indispensable element of the offense of inflicting injury in the commission of a robbery. The court concluded that "the State was estopped to charge the appellants with inflicting injury in the commission of a robbery."¹⁷¹ The dissenting justices argued that the six-month period on the robbery charge did not begin to run on the date that the charge was filed in the Municipal Court but began to run when charges were filed in the Criminal Court. They were outvoted on this issue by the majority, but just two months later a unanimous court decided the case of *Holt v. State*¹⁷² and appeared to adopt their viewpoint without discussing the apparent inconsistency with the *Johnson* decision. The dissenting justices also argued that the offense of robbery and the offense of inflicting injury in the commission of a robbery are separate and distinct offenses and that the court should not adopt the view that all offenses committed in the course of the same occurrence are to be charged at the same time and prosecuted within the same period of time or be barred from prosecution. The majority did not directly discuss the doctrine of collateral estoppel although the opinion contained the word "estopped," but the dissenting justices did discuss the doctrine and noted that the appellants relied upon the doctrine in their arguments. Thus the doctrine must have been considered by the court to some extent, but the majority opinion does not disclose the extent to which the doctrine may have been used to support the final decision.

The second decision of the court which is closely related to this issue is *Ballard v. State*,¹⁷³ discussed above with reference to guilty pleas. The court was divided in the same manner as in the *Johnson* case, and the *Ballard* opinion did not contain any reference

¹⁷¹*Id.* at 537-38.

¹⁷²316 N.E.2d 362 (Ind. 1974). See also *Simmons v. State*, 324 N.E.2d 513, 515 (Ind. Ct. App. 1975).

¹⁷³318 N.E.2d 798 (Ind. 1974).

to the doctrine of collateral estoppel. Nevertheless, the *Ballard* case is clearly related to the doctrine because it emphasizes that the prosecution's decision to accept a guilty plea to one or more charges related to a certain occurrence may thereafter limit the prosecution's ability to pursue additional charges arising out of the same occurrence.

I. Sentencing

1. Appellate Review of Sentences

Sentences in criminal cases are limited by three specific provisions of the Indiana Constitution which prohibit excessive fines, prohibit cruel and unusual punishment, and require that sentences be proportioned to the nature of the offense involved.¹⁷⁴ The Indiana appellate courts have generally held that the determination of appropriate penalties for criminal acts is a legislative function and that the appellate courts have only a limited authority to review sentences to determine if they violate any of the various constitutional provisions concerning sentencing. This view was reiterated in a number of opinions during the past year in which the appellate courts indicated that they would not set aside a sentence because it appeared to be too severe but would review sentences only to see if they were proportioned to the nature of the offense involved, imposed "atrocious or obsolete punishments," or were "grossly and unquestionably excessive."¹⁷⁵ In *Beard v. State*,¹⁷⁶ however, the Indiana Supreme Court was reminded that it was given authority by a 1970 amendment to the state constitution to review and revise sentences,¹⁷⁷ and the court was asked to exercise this authority by reducing a life sentence which had been imposed upon the defendant. The court recognized that it had been given this additional authority but declined to exercise the authority because it appeared to go beyond the court's inherent power to review sentences that exceed constitutional limitations and because "a program of policies and procedures" had not yet been established for the exercise of such authority.¹⁷⁸

The *Beard* decision considered the effect of the constitutional amendment upon the authority of the Indiana Supreme Court to review a legislative decision concerning sentencing, but the constitutional amendment also poses a question concerning the authority

¹⁷⁴IND. CONST. art. 1, § 16.

¹⁷⁵*Beard v. State*, 323 N.E.2d 216, 219 (Ind. 1975); *Rowe v. State*, 314 N.E.2d 745, 749 (Ind. 1974); *Smith v. State*, 312 N.E.2d 896, 900 (Ind. Ct. App. 1974); *Clark v. State*, 311 N.E.2d 439, 440 (Ind. Ct. App. 1974).

¹⁷⁶323 N.E.2d 216, 219 (Ind. 1975).

¹⁷⁷IND. CONST. art. 7, § 4. See also *id.* art. 7, § 6.

¹⁷⁸323 N.E.2d at 219.

of the supreme court to review the decision of a trial court when the trial court has some choice or discretion in imposing sentences. This latter question has not yet been resolved, although the court did observe in *Dickens v. State*¹⁷⁹ that "the authority of the Supreme Court to modify or revise a sentence has been constitutionalized" by this 1970 amendment.¹⁸⁰ The 1970 constitutional amendment has created similar questions concerning the authority of the Indiana Court of Appeals,¹⁸¹ and the latter question was considered during the past year by the Second District Court of Appeals in *Wills v. State*.¹⁸² The defendant in the *Wills* case had been sentenced by the trial court to serve two years in prison for carrying a pistol without a permit and asked the appellate court to reduce his sentence because of its severity under the circumstances of the case. The trial judge had imposed a two year sentence under a statute which gave him authority to impose a fine or imprisonment for a determinate period of from one to ten years,¹⁸³ and the court of appeals concluded that it could not reduce the sentence because there was no showing that the trial judge had abused his discretion. The court of appeals cited and relied on its earlier decision in *Gray v. State*,¹⁸⁴ in which the court, especially as discussed in the concurring opinion, first considered the effect of the new constitutional provision. The cases suggest that the appellate courts may begin to review sentences more frequently, but it is not clear whether this is because of newly created authority under the constitutional amendment or because the amendment codified and called attention to the inherent but seldom exercised authority of the appellate courts to take such action.

2. Felony Murder Sentences

During the past year, the Indiana Supreme Court held that first degree murder is included within the offense of felony murder,¹⁸⁵ but the court reaffirmed its view that felony murder, "although designated as first degree murder, does not carry with it charges of second degree murder or manslaughter."¹⁸⁶ In *Franks v. State*,¹⁸⁷ the defendant was charged in an indictment with felony murder and premeditated murder. After being convicted on both counts, the defendant was sentenced to life imprisonment on each

¹⁷⁹260 Ind. 284, 295 N.E.2d 613 (1973).

¹⁸⁰*Id.* at 293, 295 N.E.2d at 619.

¹⁸¹IND. CONST. art. 7, § 6.

¹⁸²318 N.E.2d 385 (Ind. Ct. App. 1974).

¹⁸³IND. CODE § 35-23-4-14 (Burns 1975).

¹⁸⁴305 N.E.2d 886 (Ind. Ct. App. 1974).

¹⁸⁵*Franks v. State*, 323 N.E.2d 221 (Ind. 1975).

¹⁸⁶*Hester v. State*, 315 N.E.2d 351, 354 (Ind. 1974).

¹⁸⁷323 N.E.2d 221 (Ind. 1975).

count. On appeal, the Indiana Supreme Court held that the defendant could not be sentenced on both counts because the premeditated murder offense was included within the felony murder charge.¹⁸⁸ The court did not consider the propriety of having two charges of this nature in the same indictment, apparently because the issue was not raised by the defendant, but the court has held in the past that it is improper for the state to include two counts in an indictment or information when the offense alleged in one count is included within the other count.¹⁸⁹ In *Birkla v. State*,¹⁹⁰ decided only a week after the *Franks* case, the Indiana Supreme Court considered a similar case in which the defendant was also charged with felony murder and first degree murder, but in this instance the jury had returned a verdict of only second degree murder in addition to the conviction for felony murder. On appeal, the court affirmed both convictions and the sentences which were imposed on each count, but the court did not discuss the propriety of such sentences, again apparently because the defendant did not raise the issue. The decision does appear to be correct, however, because of the court's general view that a charge of felony murder includes first degree murder but not second degree murder or manslaughter, a view that was reaffirmed in *Hester v. State*,¹⁹¹ the court's third major decision during the past year concerning felony murder charges.

3. Accessories and Accomplices

In *Thomas v. State*,¹⁹² the defendant was convicted as an accessory after the fact of theft from the person and as an accessory after the fact of kidnapping. On appeal, he argued that the accessory statute¹⁹³ is invalid because it provides the same penalty for the accessory as for the principal. The Indiana Supreme Court rejected this argument and held that the penalty is not disproportionate to the nature of the offense and is neither cruel nor unusual.

¹⁸⁸*Id.* at 225.

¹⁸⁹*Webb v. State*, 259 Ind. 101, 284 N.E.2d 812 (1972).

¹⁹⁰323 N.E.2d 645 (Ind. 1975).

¹⁹¹315 N.E.2d at 345. The court's discussion of this matter is dictum, however, because the court was actually concerned with whether the felony murder charge in the case included the lesser offense of robbery, the collateral offense giving rise to the felony murder charge. On this latter issue, the court held that such collateral offense could be included within the felony murder charge.

¹⁹²321 N.E.2d 194 (Ind. 1975).

¹⁹³IND. CODE § 35-1-29-3 (Burns 1975).

4. Criminal Sexual Deviancy

In *Pieper v. State*,¹⁹⁴ the defendant was convicted of sodomy and kidnapping. He then requested the court to have him examined as a possible criminal sexual deviant. The court sentenced the defendant to life imprisonment on the kidnapping charge and found the defendant to be a criminal sexual deviant on the basis of the sodomy charge. The defendant was committed to the Department of Mental Health with an order that he was to be transferred to the appropriate penal institution after being released by the department. The defendant argued on appeal that the sodomy and kidnapping charges should have been considered as merged for purposes of the criminal sexual deviancy statute and that he could not be confined under the kidnapping conviction after undergoing the sexual deviancy treatment. The Indiana Supreme Court held that the trial court could properly separate the two offenses for purposes of the sexual deviancy statute even though the offenses occurred at the same time and the kidnapping was partly or wholly motivated by the desire to commit the sexual offense. As discussed above, the court also held in *Berwanger v. State*¹⁹⁵ that a defendant must be given the right to counsel during an examination under the sexual deviancy statute.

5. Drug Abuse Treatment

The 1973 decision of the Third District Court of Appeals in *McNary v. State*¹⁹⁶ was considered in a number of cases by the other district courts during the past year. In the *McNary* case, the court held that a trial court must order an examination under the drug abuse treatment statute¹⁹⁷ for any defendant that the court has reasonable grounds to believe might be eligible for such treatment. In *Glenn v. State*,¹⁹⁸ the Second District Court of Appeals held that a trial court must advise a defendant of the possibility of treatment and offer to have the defendant examined whenever the court has reasonable grounds to believe that the defendant may be eligible for treatment. If the Department of Mental Health recommends treatment and agrees to accept the defendant, the court must then determine whether the treatment would rehabilitate the defendant before taking further action in the defendant's case. In *Reas v. State*,¹⁹⁹ the First District Court of Appeals held that a defendant has no right to treatment in lieu of imprisonment merely

¹⁹⁴321 N.E.2d 196 (Ind. 1975).

¹⁹⁵315 N.E.2d 704 (Ind. 1974).

¹⁹⁶297 N.E.2d 853 (Ind. Ct. App. 1973).

¹⁹⁷IND. CODE §§ 16-13-6.1-1 to -34 (Burns Supp. 1975).

¹⁹⁸322 N.E.2d 106 (Ind. Ct. App. 1975).

¹⁹⁹323 N.E.2d 274 (Ind. Ct. App. 1975).

because he satisfies the statutory eligibility requirements. The trial court, in its discretion, may deny such treatment if it doubts the possibility of rehabilitation. In *Thurman v. State*,²⁰⁰ the Second District Court of Appeals held that a court has no authority to suspend a defendant's sentence and order treatment under the statute when the defendant files a petition for such treatment more than six months after beginning to serve his sentence. The court distinguished the *McNary* case because the defendant in *McNary* requested the treatment within six months after his sentence was imposed.²⁰¹

6. Credit for Pretrial Confinement

In 1972, the Indiana General Assembly enacted a statute providing that a defendant is to receive credit for time spent in pretrial confinement.²⁰² When this statute was first questioned, the Indiana Supreme Court held that it was not retroactive because the legislature had not included a provision for retroactive application of the statute.²⁰³ The statute was considered again during the past year, and this time the Indiana Supreme Court held that the statute had to be given retroactive application because of the equal protection clauses in both the Federal Constitution and the Indiana Constitution.²⁰⁴ The court noted that its earlier decision had been based only upon an interpretation of the legislative intent concerning the statute whereas the defendant in the latter case had raised the constitutional arguments for the first time.²⁰⁵

²⁰⁰320 N.E.2d 795 (Ind. Ct. App. 1974).

²⁰¹See IND. CODE § 35-7-1-1 (Burns 1975).

²⁰²*Id.* § 35-8-2.5-1 (Burns 1975).

²⁰³*Fender v. Lash*, 304 N.E.2d 209 (Ind. 1973).

²⁰⁴*Brown v. State*, 322 N.E.2d 708 (Ind. 1975).

²⁰⁵*Id.* at 710.

IX. Domestic Relations

William Fox*

A. Marriage

1. The Right to Marry

In *Indiana High School Athletic Association v. Raike*,¹ the Second District Court of Appeals held that rules prohibiting married students from participating in high school athletics were invalid, but refused to deem marriage a fundamental right sufficient to trigger strict judicial scrutiny under the equal protection clause of the fourteenth amendment.² The court examined virtually all of the modern United States Supreme Court cases which discussed marriage in the context of either the equal protection clause or the due process clause of the fourteenth amendment and concluded:

[T]here is no conclusive United States Supreme Court holding that the right to marry is a fundamental right. Nor is there any such holding by our Supreme Court Our reading of recent United States Supreme Court cases indicates a shrinking rather than an expansion of the concept of "suspect" classifications and fundamental rights.³

Since the court continued on to strike down the nonparticipation rules as violative of the equal protection clause on the basis of both "intermediate" and "low tier" scrutiny, the court's discussion of the fundamental nature of the right to marry is dicta. Nonetheless, it is interesting dicta because it appears to discuss the critical Supreme Court decision, *Loving v. Virginia*,⁴ in light of an incomplete quotation from that decision which seriously weakens an extremely strong statement by the United States Supreme Court. Although *Loving* dealt with marriage in the context of the due process clause of the fourteenth amendment, the court of appeals used the decision in an effort to decide whether

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The author wishes to express his appreciation to Michael A. Shurn for his assistance in the preparation of this discussion.

¹329 N.E.2d 66 (Ind. Ct. App. 1975).

²See pp. 99-101 *supra* for additional discussion of the constitutional aspects of this case.

³329 N.E.2d at 75.

⁴388 U.S. 1 (1967).

marriage was a fundamental right sufficient to elicit strict judicial scrutiny, here in relation to the equal protection clause.

Loving, a 1967 decision, invalidated a series of Virginia statutes forbidding white persons to intermarry with nonwhites.⁵ The United States Supreme Court held the statutes invalid on two grounds. The Court found them violative of equal protection, the racial classification requiring the statutes be viewed with strict scrutiny, and due process. It is the due process discussion in this alternative holding in *Loving* which is crucial to an understanding of *Raike*. In a unanimous opinion, Chief Justice Warren, writing for the Court, discussed marriage as follows:

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.⁶

The Indiana court of appeals characterized this language, as well as other language from analogous Supreme Court opinions,⁷ as "beguiling language . . . [which] represents the opinion of individual justices and not a holding of the United States Supreme Court."⁸ This is hardly a proper description of *Loving*, even if it fairly characterizes some of the comments in dicta from other Supreme Court opinions. *Loving* was a unanimous decision, and the Court plainly framed the decision in alternative holdings—the miscegenation statutes fell on both equal protection and due process grounds. Although the due process language in *Loving* concerning marriage is weak with respect to the equal protection discussion concerning racial discrimination, it nevertheless was not merely

⁵*E.g.*, VA. CODE ANN. § 20-54 (1960) (the main statutory provision making interracial marriages illegal). This section, and others dealt with in *Loving*, 388 U.S. at 4-7, were later repealed by the Virginia legislature. Law of April 2, 1968, ch. 318, § 2, [1968] Va. Acts 430, *repealing* VA. CODE ANN. §§ 20-50 to -60 (1960).

⁶388 U.S. at 12 (citations omitted).

⁷*See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (the abortion decision, which turned on the due process rights of pregnant women and not on the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a case decided before *Loving*, which involved the right of privacy within marriage and not the right to marry).

⁸329 N.E.2d at 75.

the "opinion of individual justices." Moreover, the court of appeals, in dealing with the *Loving* language, too quickly disposed of the powerful juxtaposition of the words "right" and "fundamental" in the statements: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," coupled with the phrase in the next sentence which denominates marriage a "fundamental freedom."

It is true, of course, that the Supreme Court has never placed the word "fundamental" immediately before the word "right" in any holding dealing with marriage. Furthermore, few will deny that the framing of the *Loving* decision as a two-part holding, with the due process discussion as the shorter, secondary statement, inevitably weakens the impact of the due process portion of the opinion—the portion which dealt with marriage. The fact that *Loving* involved a racial classification that had long since lost its attractiveness for most groups also tends to overwhelm the due process discussion. Indeed, a number of courts have read *Loving* as involving only a racial discrimination issue, thus effectively reading out of the opinion the strong language of the due process holding.⁹

It is not the purpose of this section to argue that the court of appeals was required to deem marriage a fundamental right. Undoubtedly the unequivocal holding of marriage as a fundamental right would trigger some singular problems. For example, it would be difficult to argue that statutory licensing and solemnization requirements,¹⁰ which fulfill essentially a recordkeeping function, rise to the level of a "compelling state interest." In addition, the assertion that marriage is a fundamental right has been used to support an argument that strict scrutiny prohibits a state from refusing a marriage license to same-sex couples.¹¹ Nevertheless, Chief Justice Warren's due process discussion in *Loving* contains language much stronger than the court of appeals appears willing to admit. The *Raikes* opinion would have been much stronger had *Loving* been squarely faced and adequately dealt with.

2. Statutory Age Requirements

In July, 1974, a 15-year-old girl and an 18-year-old man, both residents of Blackford County, petitioned a Blackford County

⁹See, e.g., *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971); *In re Goalen*, 30 U.2d 27, 512 P.2d 1028 (1973), *cert. denied*, 414 U.S. 1148 (1974). But see *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973) (strict scrutiny applied to a merchant marine academy cadet marriage prohibition).

¹⁰See, e.g., IND. CODE §§ 31-1-1-3, -4-1 (Burns 1973).

¹¹*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

judge for waiver of the statutory minimum age requirement for marriage. When the judge denied the application, the couple renewed the application in adjoining Grant County. A Grant County superior court judge approved the application and issued an order directing the Blackford County circuit court clerk to issue the marriage license. A show cause order was entered by the Grant County court after the Blackford County clerk refused to issue the license, and the clerk then petitioned the Indiana Supreme Court for an original writ of prohibition. In *State ex rel. Leffingwell v. Superior Court No. 2*,¹² Chief Justice Givan, writing for a unanimous court, made the writ permanent and ordered the Grant County Superior Court to dismiss the contempt charge against the clerk of Blackford County, holding that the Grant County court had no jurisdiction to approve the application.

The two applicable statutes, Indiana Code sections 31-1-1-1¹³ (section 1) and 31-1-1-4¹⁴ (section 4) are somewhat confusing. Section 1 permits men and women to marry at the age of 17 with parental consent; however, if the woman is at least 15 years old and pregnant, "a circuit, superior or juvenile court of the county of residence of either applicant"¹⁵ may authorize the issuance of the license.¹⁶ Section 4 applies only to persons between 17 and 18 years of age and requires parental consent to the marriage unless consent is waived by the judge of a circuit or superior court "of the county in which either or both of the parties reside, or of a county immediately adjoining such county."¹⁷ The Grant County Superior Court had expressly referred to section 4 in ordering the Blackford County clerk to issue the marriage license.

The Indiana Supreme Court held that the section 4 disposition by the Grant County court was erroneous because those jurisdictional provisions apply only to persons between 17 and 18 years old who seek waiver of parental consent.¹⁸ However, as

¹²321 N.E.2d 568 (Ind. 1974).

¹³IND. CODE § 31-1-1-1 (Burns Supp. 1975).

¹⁴*Id.* § 31-1-1-4.

¹⁵*Id.* § 31-1-1-1(b).

¹⁶The issuance is authorized if "the putative father and the pregnant female indicate to the judge that they decide to marry; and . . . the persons required in section four of this chapter give consent to the marriage of underage applicants." *Id.* §§ 31-1-1-1(b)(1)-(2) (citations omitted).

¹⁷*Id.* § 31-1-1-4(b).

¹⁸321 N.E.2d at 570-71. The court's mistake is understandable. IND. CODE § 31-1-1-4(a) (Burns Supp. 1975) begins: "In the event an applicant for a license to marry is under eighteen [18] years of age . . ." Nowhere is there a clear limitation to the 17 to 18-year-old category. Subsection 4(b), which deals with application to the court for consent dispensation, begins: "Parties intending to marry who require parental or guardian's consent in order to

was the case here, "if the female is under seventeen, but is at least fifteen years of age, the application must be made in the county of the residence of either party and it must be established that the female is pregnant before the license will issue."¹⁹ The parties were therefore actually applying to the court under section 1.²⁰

The portion of the trial court order which stated that the girl was a resident of Grant County because she was living with her grandmother in Grant County was also set aside since the girl remained in the legal custody of her mother, a Blackford County resident, and an unemancipated child takes his residence from his parents.²¹ However, the supreme court went on hold that the license could not have issued in any event under section 1 because the girl was not pregnant at the time of the application, even though she had already given birth to a child apparently fathered by the man she presently sought to marry.²² In reading the statutory language of section 1 literally, the court reiterated the proposition that the legislature has "exclusive" power "to establish public policy as to who may marry"²³

The *Leffingwell* rationale is difficult to dispute. The court wisely refused to substitute its judgment for that of the Indiana General Assembly in an area that has traditionally been a legislative province.²⁴ There is nothing wrong with forcing the legislature to live with statutory language of its own making; however, affected parties must deal with a lack of reasoned consistency between the statutes. There seems to be little logic in the two separate jurisdictional provisions which allow 17-year-olds to shop for a sympathetic judge in either their own county or in an

obtain a license to marry" In order to ascertain who these parties requiring consent actually are, one presumably must return to section 31-1-1-1(a), which provides: "A male who has reached his seventeenth [17th] birthday may marry a female who has reached her seventeenth [17th] birthday, subject to the parental consent"

¹⁹321 N.E.2d at 571. The court's reasoning presumably is based on IND. Code § 31-1-1-1(b) (Burns Supp. 1975) which provides:

If proof is submitted to a judge of a circuit, superior or juvenile court of the county of residence of either applicant establishing the fact that the female is pregnant, the judge may authorize the clerk of the circuit court to issue a marriage license to the pregnant female and the putative father provided the female is at least fifteen [15] years of age

²⁰321 N.E.2d at 571.

²¹*Id.*, citing 11 IND. L. ENCYC. *Domicile* § 3 (1958).

²²The court cited BLACK'S LAW DICTIONARY 1342 (4th ed. 1951) for the definition of "pregnant" to exclude "a mother with a child already born." 321 N.E.2d at 571.

²³321 N.E.2d at 571.

²⁴*See, e.g., Maynard v. Hill*, 125 U.S. 190 (1888).

adjoining jurisdiction while restricting the 15-year to 17-year age group to judges only in the county of residence.

If part of the legislative purpose underlying section 1, which permits pregnant females to marry at the age of 15, is to promote legitimacy and to help ensure that children are raised in a legally established nuclear family, there is little sense in giving such assistance to pregnant females but denying the alternative of marriage to women who, having already given birth, seek to marry the putative father.²⁵ Since pregnancy is a condition precedent to triggering the provisions of section 1, a girl in a *Leffingwell*-like situation appears to have only two choices: she may become pregnant a second time by the first child's father and then apply for permission to marry sometime during the pregnancy or she may wait nearly two years until she is 17 years old and apply for permission to marry under section 4. Neither is an attractive choice, but under the statute as presently worded and as construed in *Leffingwell*, there seems to be no alternative. The statutes should be corrected: First, to eliminate the inconsistent jurisdictional provisions and, secondly, to provide that both pregnant 15-year-olds and 15-year-olds who have already borne a child may obtain court permission to marry the putative father.

3. Married Woman's Name

Elizabeth Hauptly filed a petition under the first section of the Indiana name-change statute²⁶ asking court permission to resume the use of her maiden name, Elizabeth Howard. At the hearing she testified that her married surname detracted from her own identity. Other testimony revealed that her husband concurred in the petition. The trial court denied the petition, and the court of appeals affirmed. On a motion to transfer, the Indiana Supreme Court reversed, in *Petition of Hauptly*,²⁷ holding that a trial court has no discretion to deny a name-change petition, irrespective of reasons assigned, so long as the court is assured that the change is not sought for the purpose of fraud or concealment of criminal activity. A name-change petitioner need show

²⁵Under the Indiana Probate Code, the subsequent marriage of the natural mother and father legitimates the child for the purpose of intestate succession by, from, and through the father, if there is also an acknowledgment by the father. IND. CODE § 29-1-2-7(b)(2) (Burns 1972). The same applies to children in the testate situation. *Id.* § 29-1-6-1(e).

²⁶IND. CODE § 34-4-6-1 (Burns 1973). This section provides: "The circuit courts in the several counties of this state may change the names of natural persons on application by petition."

²⁷312 N.E.2d 857 (Ind. 1974).

no "particular reason other than his personal desire for change of name;"²⁸ therefore, the trial court's refusal to grant the petition after a determination that no fraudulent intent was involved constituted an abuse of discretion.²⁹

The court continued on to point out in dictum that there is no requirement that a person proceed under the name-change statute. Instead, a person may simply adopt another name, subject to the fraud exception, because "[t]he statute merely provides for an orderly record of the change of name in order to avoid future confusion."³⁰ The court lent no credence to the assertion by the state that this name change would be detrimental to either Mrs. Hauptly's husband or her child. In dissent, however, Justice Prentice took a much stricter view of the statutory language, emphasizing the discretionary nature of the word "may" in the first section of chapter 6 on change of name³¹ and pointing out that the fourth section permits the trial court to frame a decree which "to such court shall seem just and reasonable."³² He further contended that wholly permissive name changes might seriously disrupt society's ability to keep track of people,³³ and that the burden of demonstrating reasonableness under the name-change statute should fall on the petitioner.³⁴

There are only two provisions in the Indiana Code providing for change of name. One is the statute at issue in *Hauptly*. The other is a provision in the Dissolution of Marriage Act, which provision appears to be much less discretionary than the name-change statute: "If the woman requests restoration of her maiden or previous married name, the court *shall* grant such name-change upon entering the decree of dissolution."³⁵ As to any common law requirement that a married woman take her husband's name, there is a split among the various American jurisdictions.³⁶ The Indiana Supreme Court in *Hauptly* found such a common law tradi-

²⁸*Id.* at 859.

²⁹*Id.* at 860.

³⁰*Id.* at 859.

³¹IND. CODE § 34-4-6-1 (Burns 1973). See note 26 *supra* for the statutory language.

³²IND. CODE § 34-4-6-4 (Burns 1973).

³³312 N.E.2d at 863 (Prentice, J., dissenting).

³⁴*Id.* at 862.

³⁵IND. CODE § 31-1-11.5-18 (Burns Supp. 1975) (emphasis added). This statute also requires the following: "Any woman desiring such name change shall set out the name she desires to be restored to her in her petition for dissolution as part of the relief sought."

³⁶See, e.g., the discussion in *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 295 A.2d 223 (1972). Hawaii is apparently the only state with a statutory requirement that a woman adopt her husband's surname. HAWAII REV. STAT. § 574-1 (1968).

tion but felt it in no sense deprived the married woman of her right to a name change.³⁷

In respect to the common law discussion, *Hauptly* is somewhat confusing. On the one hand, Justice Givan, writing for the court, agreed that "a woman has a common law right to do business in a name other than her married name;"³⁸ however, he spoke of "the common law requirement that she use the name of her husband"³⁹ The decision itself, under the statute, nevertheless appears quite sound and fully in keeping with the increased awareness of the separate and individual interests of married women apart from those of their husbands.

B. Dissolution

1. Financial Awards

Although the new Indiana Dissolution of Marriage Act⁴⁰ has been in effect since September, 1973, the appellate courts only recently have been faced with appeals under the statute. Two cases during this survey period, *Cox v. Cox*⁴¹ and *Temple v. Temple*,⁴² involved the financial aspects of dissolution, and both appear to be rather restrictive readings of the Dissolution Act.

In *Cox*, the trial court awarded \$22,000 to the wife as her share of the marital property, plus \$2,000 in attorney's fees. On appeal the husband attacked the \$22,000 award as excessive and not supported by the evidence. The First District Court of Appeals, looking at the record which showed "an abundance of evidence" that the wife had made a significant contribution to the couple's financial well-being in the course of the marriage,⁴³ concluded that the award of \$22,000 did not constitute an abuse of the trial court's discretion.⁴⁴

The actual outcome of the case is sound; the \$22,000 appears fair under the circumstances. However, the court of appeals had

³⁷312 N.E.2d at 860.

³⁸*Id.* at 859.

³⁹*Id.* at 860 (emphasis added).

⁴⁰IND. CODE §§ 31-1-11.5-1 to -24 (Burns Supp. 1975) [hereinafter referred to as the Dissolution Act]. For a general discussion of the Dissolution Act see *Domestic Relations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 153, 158-63 (1973) [hereinafter cited as *1973 Survey of Indiana Law*].

⁴¹322 N.E.2d 395 (Ind. Ct. App. 1975).

⁴²328 N.E.2d 227 (Ind. Ct. App. 1975).

⁴³This contribution included physical labor, described by Judge Lowdermilk, in a statement that surely wins this year's male chauvinist award, in the following manner: "Sarah, while in Oregon, did the work of a man in repairing and remodeling buildings . . . helping to lay tile, digging ditches and building roads." 322 N.E.2d at 397.

⁴⁴*Id.* at 398.

an opportunity to discuss this case in relation to the Dissolution Act, but did not do so. In fact, the court did not even cite the relevant sections of the Dissolution Act even though the Act was applicable⁴⁵ and contained a specific provision governing property settlement upon dissolution.⁴⁶ Instead, the court chose to cite a fifteen-year-old Indiana appellate court opinion, *Bahre v. Bahre*,⁴⁷ for the criteria to be used in framing award decrees—criteria different from those under the Dissolution Act.

As a threshold matter, the court persistently referred to the award made in this case as "alimony." That was incorrect. While the concept of alimony may once have existed in this state as a description of certain financial aspects of divorce decrees,⁴⁸ it is not used in the Dissolution Act. The proper term to describe the award at issue in the *Cox* case is "property settlement" or "property disposition."⁴⁹

The criteria for the disposition of property are set out in section 11 of the Dissolution Act. These factors appear to be mandatory considerations for the trial court: "In determining what is just and reasonable the court *shall* consider the following factors"⁵⁰ The new statutory criteria,⁵¹ which substantially

⁴⁵The new Act clearly applied. The dissolution petition was filed on February 1, 1974, five months after the effective date of the Act, September 1, 1973.

⁴⁶IND. CODE § 31-1-11.5-11 (Burns Supp. 1975).

⁴⁷133 Ind. App. 567, 181 N.E.2d 639 (1962).

⁴⁸The term itself was unclear under early case law and remained confusing. See generally Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970). See also 1973 Survey of Indiana Law 160 & n.41.

⁴⁹IND. CODE § 31-1-11.5-11 (Burns Supp. 1975). Labels can be important. See Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAMILY L. 515, 560 (1973).

⁵⁰IND. CODE § 31-1-11.5-11 (Burns Supp. 1975) (emphasis added).

⁵¹Section 31-1-11.5-11 provides that the following criteria be considered in a property disposition:

- (a) The contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
- (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
- (c) the economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;
- (d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
- (e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

Since this section uses the mandatory term "shall," it is arguable that the trial record must expressly reflect court consideration of these factors. Thus,

differ from those announced in *Bahre*,⁵² therefore should have been applied. It is difficult to understand how the court determined that language in an intermediate appellate court opinion, decided under a repealed statute,⁵³ would control in the face of different language in a new statute which is clearly intended to be a full-blown revision of the earlier law.⁵⁴

Furthermore, there is no indication in the *Cox* opinion that the trial court applied the correct technique for examining the extent of the couple's disposable property prior to framing the ultimate disposition. The Dissolution Act adopts the "hotchpot" approach⁵⁵ for accumulating the couple's property before applying the statutory criteria to dispose of it. The statutory "hotchpot" scheme requires the trial court to lump all property together, "whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage and prior to final separation . . . or acquired by their joint efforts"⁵⁶ Concededly, the trial court in *Cox* may have accomplished the same result sub silentio. In approving the trial court's disposition of the property, the appellate court referred to the husband's total net worth and also discussed the wife's separate financial holdings; nevertheless, that language lacked the persuasiveness of a specific finding that the "hotchpot" approach was used.

The *Cox* court also addressed the award of attorney's fees in a dissolution action, holding that a fee award of \$2,000 was not an abuse of discretion even though there had been no evidence presented on the record regarding fees.⁵⁷ Again, however, the

the enumerated criteria would be more than mere tests for appellate review of the propriety of the award, the purpose for which the *Cox* court apparently used the *Bahre* criteria.

⁵²Under *Bahre* the following criteria were to be considered in a property disposition:

- (1) The existing property rights of the parties; (2) the amount of property owned and held by the husband and the source from which it came; (3) the financial condition and income of the parties and the ability of the husband to earn money; (4) whether or not the wife by her industry and economy has contributed to the accumulation of the husband's property; (5) the separate estate of the wife

133 Ind. App. at 571, 181 N.E.2d at 641 (citations omitted).

⁵³Ch. 43, § 20, [1873] Ind. Acts 107 (repealed 1973).

⁵⁴See, e.g., IND. CODE § 31-1-11.5-1(a) (Burns Supp. 1975), which states: "This chapter shall be construed and applied to promote its underlying purposes and policies . . . [which include] (3) to provide for the disposition of property"

⁵⁵*Id.* § 31-1-11.5-11. See the discussion of this approach in the UNIFORM MARRIAGE AND DIVORCE ACT § 307 (as amended 1973).

⁵⁶IND. CODE § 31-1-11.5-11 (Burns Supp. 1975).

⁵⁷322 N.E.2d at 398. The court relied on prior law which provided that a trial court could take judicial notice of what reasonable attorney's fees

court neglected to cite the Dissolution Act, which contains an express provision for fees in a "reasonable amount" and permits an attorney to enforce the fee portion of the order in his own name.⁵⁸

In the only other opinion during the survey period which directly involved the Dissolution Act, *Temple v. Temple*,⁵⁹ the First District Court of Appeals affirmed a decree of dissolution in which the trial court refused to order spousal maintenance for a wife who suffered from grand mal epilepsy. The wife based her claim for maintenance largely on uncontroverted testimony from a physician that the physical effects of the medication, which she had to take to control her epilepsy, made her unemployable.⁶⁰ The husband testified that the wife did an adequate job running the household and that she "would be better off if she worked."⁶¹

The statute controlling awards of spousal maintenance forbids awards of maintenance "except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court *may* make provision for the maintenance of said spouse"⁶² This section is phrased in discretionary terms as to the award itself, but it first requires a specific finding of material impairment of earning capacity before the maintenance award may be considered. Even where there is a finding of material impairment, "a maintenance award is not mandatory,"⁶³ but rather, may be decreed in the proper discretion of the trial court.

In *Temple*, the appellate court found that the denial of maintenance involved no abuse of discretion, implying that the trial court had made no clear error in determining that the two-step statutory criteria had not been satisfied by the wife. Quite obviously, the result may be explained as the trial court's refusing to believe the medical expert and the appellate court's acknowledging the trial

would be. See *DeLong v. DeLong*, 315 N.E.2d 412 (Ind. 1974), discussed at pp. 222-23 *infra*, in which the Indiana Supreme Court held that an award of \$100 in a case involving modification of a support decree was not an abuse of discretion.

⁵⁸IND. CODE § 31-1-11.5-16 (Burns Supp. 1975).

⁵⁹328 N.E.2d 227 (Ind. Ct. App. 1975).

⁶⁰*Id.* at 228.

⁶¹*Id.*

⁶²IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1975) (emphasis added). Following the common law tradition of first looking for court decisions construing a statute before grappling with the statute itself, the appellate court interpreted this statute only after concluding that: "Neither of the parties cited any authority under the [maintenance] statute and it now appears that none has been enunciated by this court." 328 N.E.2d at 229.

⁶³328 N.E.2d at 230.

court's right to do so. The appellate court pointed out the traditional rule—not affected by the Dissolution Act—that an expert witness who gives uncontroverted testimony does not have to be believed.⁶⁴

It is clear that the wife was taking maximum doses of anti-convulsives.⁶⁵ It is also implied by the court's recitation of the tasks she could do, and from her husband's testimony, that she had not worked outside the home recently.⁶⁶ The wife therefore may not have had marketable skills even if she were physically able to work. Additionally, the trial court apparently made no inquiry as to whether there had been a deterioration of prior skills which, coupled with her epilepsy, would be sufficient to warrant an award. In this vein, the Uniform Marriage and Divorce Act, in language not adopted in Indiana, speaks of "appropriate employment" rather than mere theoretical employability in any capacity.⁶⁷ Even if the wife in *Temple* were able to work as a housekeeper, it is far less certain on the record that she would be able to secure employment at a salary sufficient to keep the house, contribute to the support of the children, and feed herself. The trial court's decision thus seems less than sensitive to the problems of an epileptic housewife thrown onto the job market with two children to raise and rusty job skills.

There is, however, an additional basis on which the award of maintenance might properly have been refused. A basic premise of the Uniform Act's provisions regarding financial disposition states that the trial court should look first to the property disposition to help resolve the future financial needs of the spouses before it orders maintenance.⁶⁸ As the Act's commentary points out, the intention of the property disposition section and the maintenance section, not adopted verbatim in Indiana, "is to encourage the court to provide for the financial needs of the spouses by property disposition Only if the available property is insufficient for the purpose . . . may an award of maintenance be ordered."⁶⁹ In *Temple* the wife received custody of the children, \$50 per week child support, the residence (with encumbrances), a 1970 automobile (without encumbrances), and the household goods.⁷⁰ A court might conclude, again in the proper exercise of its discre-

⁶⁴*Id.* at 229, citing *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

⁶⁵328 N.E.2d at 228.

⁶⁶*Id.*

⁶⁷UNIFORM MARRIAGE AND DIVORCE ACT § 308 [hereinafter referred to as the Uniform Act].

⁶⁸*Id.*

⁶⁹*Id.*, Commissioners' Note.

⁷⁰328 N.E.2d at 228.

tion, that these arrangements were sufficient to give the wife financial stability without ordering maintenance. Maintenance is simply not a favored award, under either the Uniform Act or the Indiana Dissolution Act.

In contrast with *Temple*, the question of adequate financial support following divorce for a disabled spouse was addressed somewhat more sympathetically by the Second District Court of Appeals in *Zagajewski v. Zagajewski*.⁷¹ In *Zagajewski*, a case which arose prior to the effective date of the Dissolution Act, the permanently disabled husband appealed from a trial court decision which gave virtually all the entireties property to his non-disabled wife and ordered him to pay \$850 for her attorney's fees and costs. The wife was ordered to pay the husband only \$1,626.55 when he conveyed their jointly owned real estate to her sole ownership.⁷² The court of appeals reversed this decree on the basis of the trial court's abuse of discretion.⁷³ The appellate court was disturbed by the trial court's "failure to make a compensating provision for the permanently disabled husband which bears a reasonable relationship to the past contributions of the parties and to their prospective earning capacity."⁷⁴ The court continued on to point out that it was not sufficient to determine that the husband could live on his pensions since "the fact that he can survive on those benefits alone does not appear to justify taking his equity in the entireties property for the benefit of his able-bodied school teacher wife who can earn some three times that much for herself."⁷⁵

2. *Enforcement of Financial Awards by Contempt*

Even in the face of court-ordered support payments, spouses charged with this duty often do not pay. The Uniform Reciprocal

⁷¹314 N.E.2d 843 (Ind. Ct. App. 1974).

⁷²*Id.*

⁷³*Id.* at 846. As the court had pointed out earlier in its opinion:

The appellee-wife, at time of trial, is in good health (except for taking tranquilizers for her nerves), fifty-three years of age, is an employed school teacher who earned over ten thousand dollars in the year preceding trial. The appellant-husband, fifty-six years of age, is totally disabled (as to gainful employment), but is ambulatory, able to drive his automobile, and apparently able to care for himself. After the divorce he will draw two hundred sixty dollars per month in social security and veterans benefits, plus full medical and hospital expenses and \$98.00 monthly for the son's support.

Id. at 844.

⁷⁴*Id.* at 846. The husband had contended that the wife's award had constituted 93 percent of their former property.

⁷⁵*Id.*

Enforcement of Support Act⁷⁶ was designed to provide some assistance in this regard when spouses flee into other jurisdictions. Within single jurisdictions, however, the person to whom the payment is owed may usually invoke the regular machinery for the enforcement of judgments, often including the remedy of contempt.

In *State ex rel. Schutz v. Marion Superior Court*,⁷⁷ the Indiana Supreme Court held that the use of contempt to enforce payment of an "alimony judgment" ran afoul of the constitutional prohibition against imprisonment for debt. A separation agreement, which had been merged in the divorce decree, required the husband to make monthly payments, termed "alimony" in the agreement, of \$475 per month. Over a 6-month period, he paid nothing in three months and only \$75 in each of three other months. The wife petitioned for a contempt citation, and after a hearing, the superior court found the husband in contempt.⁷⁸ The husband then brought an original action for a writ of prohibition in the Indiana Supreme Court, which made the temporary writ permanent and reversed the trial court.

Article 1, section 22 of the Indiana Constitution provides, in part, that "there shall be no imprisonment for debt, except in the case of fraud." This provision is typical of those in many state constitutions, which, in other jurisdictions, have not always served as a barrier to the use of contempt for the enforcement of money judgments in domestic relations cases. For example, in 1973, the Idaho Supreme Court was faced with a situation strikingly similar to that in *Schutz* involving an ex-husband who had defaulted on payments under a merged settlement agreement.⁷⁹ The husband was held in contempt for failing to make his payments. He appealed, citing the Idaho Constitution's provision forbidding imprisonment for debt. The court permitted the use of the contempt power, however, and held that this clause applied "to matters basically contractual in nature. Problems of domestic relations involving alimony, support payments, property settlements, together with court orders in connection therewith, are state concerns and involve safeguarding the vital interests of the people."⁸⁰

In *Schutz*, though, the court flatly stated that contempt has not been "a proper means of enforcing an alimony judgment,"⁸¹ at least since a 1904 decision, *Marsh v. Marsh*.⁸² The court used

⁷⁶For a discussion of the Act in Indiana see pp. 223-25 *infra*.

⁷⁷307 N.E.2d 53 (Ind. 1974).

⁷⁸*Id.* at 54.

⁷⁹*Phillips v. District Court*, 95 Idaho 404, 509 P.2d 1325 (1973).

⁸⁰*Id.* at 406, 509 P.2d at 1327; *accord*, *Harvey v. Harvey*, 153 Colo. 15, 384 P.2d 265 (1963); *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958).

⁸¹307 N.E.2d at 54.

⁸²162 Ind. 210, 70 N.E. 154 (1904).

the remainder of the opinion to discuss a much later case, *State ex rel. Roberts v. Morgan Circuit Court*,⁸³ which contained language arguably eroding the *Marsh* holding. The court quickly pointed out that the discussion of enforcement of alimony judgments by contempt had been unnecessary to the *Roberts* decision, but nevertheless expressly overruled any portion of *Roberts* which might be construed to conflict with *Marsh*, since the use of contempt proceedings to enforce the payment of a money judgment would violate the Indiana Constitution.⁸⁴

While *Schutz* squarely prohibits use of contempt to enforce alimony judgments, now property distributions under the Dissolution Act, the limits of *Schutz* are unclear.⁸⁵ For example, the case said nothing about support payments, either to children or spouses, not in the nature of property disposition. Neither did it speak to default on support duties by persons in undissolved families. It is possible, although unlikely, that *Schutz* may be narrowly limited only to financial payments arising out of merged settlement agreements and not extended to orders framed initially by a court. Regardless, the threat of contempt is sometimes the last possible leverage which may be used against a defaulting spouse; therefore, it may not be wholly wise to limit excessively its use through the *Schutz* holding.

C. Custody of Children

1. Change of Custody Between Natural Parents

a. Scope of Review of Modification Petitions

In *Marshall v. Reeves*,⁸⁶ a mother had been given custody of a child by a 1970 divorce decree, and the father had been awarded bi-weekly visitation rights. Two years later, with no notice to the husband or the court, the mother took the child and moved to

⁸³249 Ind. 649, 232 N.E.2d 871 (1968).

⁸⁴307 N.E.2d at 55. The court in *Roberts* attempted to distinguish *Marsh* on the basis of a 1949 statutory amendment which allowed alimony to be considered a money judgment. Ch. 43, § 22, [1873] Ind. Acts 107 (repealed 1973). That provision was part of the old divorce law, which was still in effect when *Schutz* arose.

⁸⁵The Dissolution of Marriage Act contains an express provision allowing the use of contempt procedures. IND. CODE § 31-1-11.5-17 (Burns Supp. 1975). This statute lumps together a discussion of child support and property disposition and provides that "terms of the decree may be enforced by all remedies available for enforcement of a judgment including but not limited to contempt" *Id.* Presumably this provision now has no effect, at least with respect to property disposition, since *Schutz* was a decision resting on the Indiana Constitution rather than on the earlier statutory law.

⁸⁶311 N.E.2d 807 (Ind. 1974).

Arizona, where she apparently remarried. The father then filed a petition for a change in custody, seeking to get custody himself. The wife defaulted, so the trial court granted the change in custody, ordered the child returned to the court's jurisdiction, and held the wife in contempt on three grounds: (1) Removal of the child without court permission, (2) refusal to allow the father his visitation rights, and (3) failure to appear.⁸⁷ The Second District Court of Appeals had reversed the trial court and remanded the action for a new trial on grounds that the record did not support a finding of a "decisive" change in circumstances.⁸⁸ On transfer, however, the Indiana Supreme Court reinstated the trial court decision, adopting in part the dissent in the court of appeals, written by Presiding Judge Buchanan.⁸⁹

Custody cases are difficult and sometimes ugly disputes, often involving the use of children as pawns in the underlying disagreements between the two parents. The *best interest test* was initially formulated to circumvent the traditional idea that children were somehow chattels belonging to one or the other of the parents and to force the trial court to focus on the child, not on the parents.⁹⁰ The Indiana Supreme Court has long recognized this principle, pointing out in 1964 that the custody decision "cannot be used as a means of punishing the parents. It is the children's welfare—not the parents'—that must control the actions of the [trial] courts."⁹¹ Although the best interest test controls during the initial custody dispute, modification of the custody decree requires something more—a showing of a *decisive change in conditions* which demands, in the child's best interest, a change in the original custody decree.⁹² Thus, on a modification petition, the

⁸⁷*Id.* at 809.

⁸⁸*Marshall v. Reeves*, 304 N.E.2d 879 (Ind. Ct. App. 1973).

⁸⁹311 N.E.2d at 809. The supreme court's opinion principally consisted of a quotation of part of Presiding Judge Buchanan's dissent in the court of appeals.

⁹⁰The "best interest test" has been traced to a 1925 opinion written by Judge Cardozo:

[The trial court] does not proceed upon the theory that the petitioner, whether father or mother, has cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child He is not adjudicating a controversy between adversary parties, to compose private differences Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

⁹¹311 N.E.2d at 810, *quoting from* *Wible v. Wible*, 245 Ind. 235, 237, 196 N.E.2d 571, 572 (1964).

⁹²311 N.E.2d at 811, *quoting from* 304 N.E.2d at 888 (Buchanan, P.J., dissenting), which relied on a line of Indiana decisions including *Wible v. Wible*, 245 Ind. 235, 196 N.E.2d 571 (1964).

trial court must find a decisive change in conditions and then determine that, in the child's best interest, the change in circumstances warrants a modification of the existing decree.⁹³

These rules, of course, govern the trial court in its decision and not the appellate court in reviewing the trial court's decision. In *Marshall*, the supreme court decided that the majority of the Second District Court of Appeals had applied the wrong standard of appellate review of the trial court's modification order. Quoting from Judge Buchanan's dissent, the court pointed out that the decision to modify is within the trial court's discretion, and, on appeal, the only determination reserved to the appellate court is whether the trial court has abused its discretion.⁹⁴ Here, the supreme court, again by agreeing with the dissent below, felt the court of appeals used the change in conditions test to weigh the evidence and substitute its own judgment on the facts.⁹⁵ Thus, *Marshall* appears to hold that an appellate court may reverse modification orders, as an abuse of discretion, only if the following conditions are present: (1) The petition contains no allegation of a decisive change in conditions, (2) evidence of such change is totally lacking in the record, and (3) the trial court has made no findings of fact which warrant the change in custody.⁹⁶

⁹³The 1973 Indiana Dissolution Act contains no express provision for modification of custody, although it contains language which, by implication, appears to permit modification. IND. CODE § 31-1-11.5-17 (Burns Supp. 1975) (allowing modification of child support); *id.* § 31-1-11.5-22(d) (in investigations, speaking of evidence "prior to the last custody proceeding"); *id.* § 31-1-11.5-24 (expressly permitting modification of visitation rights). Moreover, several recent cases not controlled by the Dissolution Act permitted modification because the court retained jurisdiction after the initial decree. See, e.g., *Mueller v. Mueller*, 259 Ind. 366, 287 N.E.2d 886 (1972).

Indiana did not adopt the custody modification provisions of the Uniform Marriage and Divorce Act, on which much of the Indiana Dissolution Act is based. The Uniform Act is much more restrictive as to modification:

No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

UNIFORM MARRIAGE AND DIVORCE ACT § 409(a). Indiana's lack of a similar provision seems clearly destined to promote a multiplicity of petitions to modify custody by litigious parents when the child desperately needs stability. See *Watson, The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969).

⁹⁴311 N.E.2d at 811, quoting from 304 N.E.2d at 888 (Buchanan, P.J., dissenting).

⁹⁵*Id.*

⁹⁶*Id.* *Marshall* indirectly sets out these three factors. Judge Buchanan had stated in his dissent that the Indiana Supreme Court had reversed custody modifications when these deficiencies were present, and the supreme

b. *Necessary Change in Conditions for a Change in Custody*

Another factor which creates problems in custody situations is the removal of children by a parent from the jurisdiction in defiance of the custodial order—an act which troubles the courts. There are at least two legal conditions which lead to this problem: The American legal system contains precious little machinery to enforce judgments across jurisdictional lines, and the United States Supreme Court has refused to require that full faith and credit be given child custody decrees since such a holding would prohibit a court from analyzing the case solely in terms of the child's best interest.⁹⁷ It was under this state of the law that the mother in *Marshall* left Indiana in defiance of the father's visitation rights and failed to participate in the Indiana petition to modify. For these actions she was held in contempt by the trial court.

The Indiana Supreme Court condemned this sort of interstate flight in the strongest terms as "an unchecked license to flaunt and thwart the continuing jurisdiction of the court in child custody proceedings."⁹⁸ Additionally, to further clarify this problem area, the court held that the mere absence of a provision in a decree of custody as to any removal of the child from the jurisdiction does not, by silence, confer such a right on the custodial parent, at least when the noncustodial parent is given regular visitation rights.⁹⁹ The court stated that to hold otherwise would give the custodial party the ability to "make a unilateral determination" as to custody and visitation and usurp the power of the court to exercise continuing jurisdiction over the child's custody.¹⁰⁰ Nevertheless, the court refused to hold that such a violation, standing alone, would provide a sufficient basis for the trial court to find the requisite decisive change in conditions to modify custody.¹⁰¹ This is only logical in that any rule appended to the best interest test would, in effect, modify that test and thus interfere

court wrote an opinion which adopted and quoted that part of Judge Buchanan's dissent.

⁹⁷*May v. Anderson*, 345 U.S. 528 (1953). In dissent, Justice Jackson predicted that *May* would result in a "rule of seize-and-run." *Id.* at 542 (Jackson, J., dissenting). Moreover, some commentators are now urging stability as a prime requirement for children of divorce. See generally J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

⁹⁸311 N.E.2d at 813.

⁹⁹*Id.* Removal can be made only with prior judicial sanction: by agreement of the parties approved by the court or after due hearing before the court. *Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* This factor may be one, however, to be considered with others to indicate a change in circumstances concerning the best interest of the child. *Id.*

with the court's analysis of the controversy solely in terms of what is best for the child.

The First District Court of Appeals in *Leohr v. Leohr*¹⁰² and the Third District Court of Appeals in *Ecker v. Ecker*¹⁰³ dealt with the question of what specific type of facts constitutes the requisite "definitive change in conditions" necessary to obtain a change in custody, but did not suggest any helpful general guidelines. In *Leohr*, the mother had been originally awarded custody; however, at the hearing on his petition for a change of custody to himself, the father was able to show rather bizarre conduct on the mother's part. He demonstrated that on a number of occasions the mother had displayed a violent temper in the presence of the child and at least once had driven an automobile recklessly with the child as a passenger. The trial court made specific findings that these acts presented a serious danger to the child and constituted the necessary change in conditions to order a change in custody.¹⁰⁴ The court of appeals quickly determined that its scope of review extended only to whether the trial court had abused its discretion and concluded that it had not.¹⁰⁵

The *Ecker* facts were a bit different, but the appellate court merely affirmed the same principle involved in *Leohr*—the test on review is only "abuse of discretion" by the trial court. In *Ecker* also, the father had sought a change of custody away from the mother to himself. The record on hearing showed that the mother had engaged in illicit sexual activity which had a direct impact on the children since the children were often left unsupervised.¹⁰⁶ On one occasion, the mother "awakened her children at one o'clock A.M., on a sub-zero, snowy night and took them with her to search for her male friend."¹⁰⁷ The court of appeals examined this record and the trial court award of custody to the father, concluding there had been no abuse of discretion.¹⁰⁸

2. *Disputes Between Parents and Third Persons*

Disputes over child custody often arise between a natural parent and some other person. Because courts are understandably reluctant to interfere between a natural parent and a child, the best interest test, usually applied in custody disputes between two natural parents, is modified in Indiana when the controversy in-

¹⁰²316 N.E.2d 400 (Ind. Ct. App. 1974).

¹⁰³323 N.E.2d 683 (Ind. Ct. App. 1975).

¹⁰⁴316 N.E.2d at 402.

¹⁰⁵*Id.*

¹⁰⁶323 N.E.2d at 684.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

volves a natural parent and someone else. The court requires a showing of parental unfitness before custody may be given to a third party. In two recent decisions, two appellate districts took different approaches to this issue but apparently have not disturbed this parental unfitness prerequisite for awarding custody to a person who is not a natural parent.

In *Hendrickson v. Binkley*,¹⁰⁹ the First District Court of Appeals reversed a trial court decision giving custody of a child to the grandparents rather than to the natural father, who had also sought custody. Seven years prior to the present controversy, the natural mother and father had been divorced, with custody of the 3-year-old son being awarded to the mother. The wife had returned to her parents' home with the child, and the child had apparently resided with his maternal grandparents for about seven years until the father instituted the present habeas corpus proceeding to gain custody of the child. In the meantime, the natural mother had died and the natural father had married another woman with three children.¹¹⁰

The record showed that the father had a well-paying job and that his new wife was willing to have the son live with them; however, it also revealed that the child enjoyed a happy, stable existence with the grandparents. Following trial, the trial court entered judgment for the grandparents based expressly on the best interest of the child, although the grandparents' return to the writ of habeas corpus had alleged that the father was unfit.

In reversing this decree, Judge Lowdermilk, writing for the court, determined that there had not been the requisite showing of unfitness necessary to rebut the presumption that it is in the child's best interest to be in the custody of his natural parent.¹¹¹ From a synthesis of earlier cases, the court determined that this presumption may be rebutted only by a "clear and cogent" showing of one of three things: parental unfitness, "long acquiescence" by the natural parent in the existing custodial disposition, or "voluntary relinquishment."¹¹² The court also analogized to adoption

¹⁰⁹316 N.E.2d 376 (Ind. Ct. App. 1974).

¹¹⁰*Id.* at 377. The father had made two previous attempts to secure visitation rights but was refused although he had the duty to support the child stemming from the original divorce decree. After these denials, the father stopped making support payments. A number of earlier payments made to the court registry had never been picked up by the grandparents. *Id.* at 377-78.

¹¹¹*Id.* at 381. The court had earlier pointed out the general rule that, on the death of the parent with custody under a divorce decree, the right to custody automatically passes to the surviving parent, unless the survivor is unsuitable. *Id.* at 378-79, citing *Gregory v. Superior Court*, 242 Ind. 42, 176 N.E.2d 126 (1961); *Combs v. Gilley*, 219 Ind. 139, 36 N.E.2d 776 (1941).

¹¹²316 N.E.2d at 380.

proceedings, which require a showing of parental abandonment or failure to support before a child may be adopted contrary to the wishes of his parents.¹¹³ In justifying a test different from a mere "best interest test," the court recognized:

If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents.¹¹⁴

In contrast, the Third District Court of Appeals in *Franks v. Franks*¹¹⁵ refused to require the trial court to make an express finding of parental unfitness before granting an award of custody to a third party. The *Franks* custody dispute was also between the natural father and, ostensibly, the maternal grandparents. The dispute arose out of a divorce action between the natural mother and father, both of whom also sought custody. In an unusual decree, the trial court granted the divorce but refused custody to both natural parents, instead giving the child over to the maternal grandparents, with whom the natural mother lived. The trial court's reasoning was apparently based on the fact that the mother was mentally retarded and the father was sexually irresponsible; at one point during the marriage he had permitted another woman to live in their home and had been abusive to his wife.¹¹⁶

As in *Hendrickson*, the mother's cross-complaint for custody contained an allegation that the father was unfit, but the trial court did not make an express finding of parental unfitness before awarding custody to the grandparents. Unlike the *Hendrickson* court, however, the court in *Franks* refused to reverse solely for the lack of an explicit finding of unfitness,¹¹⁷ emphasizing that custody matters are within the trial court's discretion and that the trial court will be reversed only for an abuse of discretion.¹¹⁸

¹¹³*Id.* at 380-81, citing *In re Bryant's Adoption*, 134 Ind. App. 480, 189 N.E.2d 593 (1963).

¹¹⁴316 N.E.2d at 381.

¹¹⁵323 N.E.2d 678 (Ind. Ct. App. 1975).

¹¹⁶*Id.* at 679-80.

¹¹⁷In dealing with the absence of a specific finding of parental unfitness by the trial court, the appellate court contended that the trial court impliedly made a finding of the father's unfitness by finding on the mother's cross-complaint which alleged that the father was unfit. Also, the appellate court noted that the father had cited no cases requiring that the trial court make an explicit finding of unfitness. *Id.* at 679.

¹¹⁸*Id.* at 680-81. The natural father in *Franks* also cited the trial court's refusal to interview the child in chambers (both counsel had agreed to the interview) as reversible error. The appellate court held that an interview with

The appellate court found no such abuse of discretion in *Franks*.¹¹⁹

Franks and *Hendrickson* are initially difficult to harmonize. One distinction, though, is the factual difference. In *Hendrickson* the natural mother was dead; in *Franks* she was living, although retarded, and presumably would continue to care for her child¹²⁰ although legal custody was given to her parents. The *Franks* disposition might be regarded as an award made to the natural mother for practical purposes, with only legal custody going to the grandparents.¹²¹ At any rate, the *Franks* decision does not have the aspects of a third party snatching a child away from a natural parent simply because the third party could provide more "advantages"—a concern which obviously troubled Judge Lowdermilk in *Hendrickson*.

Judge Lowdermilk's worry is a compelling one, raising as it does the bothersome question of when and to what extent a court may disrupt a natural parent's rights in his child. In virtually all the other situations in which a trial court may sever the rights of a natural parent and give over the child to someone else, including the state, some showing of unfitness—whether exemplified by abandonment, abuse, or neglect—is required.¹²² It is difficult to believe that the legislature contemplated any different standard in custody disputes, although it is arguable that the new Dissolution Act does away with the parental unfitness test.¹²³

The problem appears largely attributable to the Indiana Supreme Court's failure to clarify the standard. In this respect, it is instructive to note that both *Hendrickson* and *Franks* cited

the child prior to a custody disposition is similarly within the trial court's discretion. *Id.* at 681.

¹¹⁹*Id.* at 681.

¹²⁰*Id.* at 680.

¹²¹In her cross-complaint, the mother had requested custody be awarded to either her or her parents. The record reflected also a willingness on the part of the maternal grandparents to care for the mother and child together. *Id.*

¹²²See, e.g., IND. CODE § 31-3-1-6(g) (1) (Burns Supp. 1975) (dispensation of consent of natural parents to adoption if the child is adjudged to have been abandoned); *id.* § 31-3-1-7 (termination of parental rights).

¹²³The child custody provisions of the Dissolution Act specify that custody is to be decided "in accordance with the best interests of the child" with "no presumption favoring either parent." *Id.* § 31-1-11.5-21(a). The "wishes of the child's parent or parents" is only one of six factors to be considered by the trial court. *Id.* § 31-1-11.5-21(a) (2). Moreover, it cannot be said that this statute involves only disputes between two parents, because the immediately preceding section specifically provides that a custody petition may be brought by either parent "or by a person other than a parent." *Id.* § 31-1-11.5-20.

the same supreme court decision, *Duckworth v. Duckworth*.¹²⁴ *Duckworth*, however, did not clearly address itself to the point at issue here—whether parental unfitness must be expressly found before an award of custody can be made to a third party. Instead, the case seemed to be more concerned with the test for review on appeal. A later case, *Gilchrist v. Gilchrist*,¹²⁵ also cited by the *Franks* court, involved a dispute between the natural mother on the one hand and the new wife of the natural father on the other. The supreme court's discussion in *Gilchrist*, though, again centered around the scope of review.

The arguments on both sides of this particular controversy are compelling. Few would disagree that natural parents have identifiable rights in their children and should not lose them to third parties merely because the third party can make a stronger showing of ability to provide and care for the child. This consideration clearly underlies the requirement for showing abandonment or unfitness in the statutes providing for adoption and termination of parental rights.¹²⁶ On the other hand, if the trial court is to seek exclusively the disposition that would be in the child's best interest, then it ought to be able to find the best possible placement for the child irrespective of the fact that a potential custodian is not a natural parent. The supreme court could resolve the issue either by rejecting the *Hendrickson* rationale and permitting the court to decide between contesting parties on the same basis, irrespective of parental ties, or by clearly establishing unfitness as the test in controversies between natural parents and third parties and retaining the best interest test only between natural parents.

3. *The Use of Habeas Corpus in Custody Disputes*

The noncustodial parent quite often uses the petition of habeas corpus to begin a challenge to the custodial parent's right to custody of minor children. In *Ortega v. Ortega*¹²⁷ the use of the habeas corpus approach by the father produced an undesired result for him, however. He and the children's mother had been divorced in Venezuela, with the original Venezuelan custody decree giving the father custody during the school year and the mother custody during the summer. When the mother refused to return the children at the end of a summer period, the father

¹²⁴203 Ind. 276, 179 N.E.2d 773 (1932) (award to brother of child's natural father), cited in *Franks v. Franks*, 323 N.E.2d 678, 680 (Ind. Ct. App. 1975); *Hendrickson v. Binkley*, 316 N.E.2d 376, 380 (Ind. Ct. App. 1974).

¹²⁵225 Ind. 367, 75 N.E.2d 417 (1947).

¹²⁶IND. CODE §§ 31-3-1-6(g) (1), -7 (Burns Supp. 1975).

¹²⁷315 N.E.2d 370 (Ind. Ct. App. 1974).

brought an Indiana habeas corpus action. At the habeas corpus hearing, the mother was permitted to give evidence of a change in conditions sufficient to modify the custody order, while the father insisted that the only issue properly cognizable at the habeas hearing was whether she had properly retained the children under the original decree. The trial court overruled his objection, however, and changed the award to give the mother schooltime custody with the children going with the father only for the summer.¹²⁸ The First District Court of Appeals affirmed and refused to restrict the scope of presentation by the parties in this sort of habeas corpus action. In declaring that Indiana law was other than the father had contended, the court pointed out: "[A] return as commanded by the writ of *habeas corpus* is effective to place the child in the custody of the court subject to its disposition with unlimited power as to custody, guided only by the child's welfare and best interest."¹²⁹

In a similar case, *Ray v. Stanton*,¹³⁰ the Second District Court of Appeals decided that a superior court lacked jurisdiction to act on a habeas corpus petition brought by a mother to regain custody of her children from the county welfare department. The court held that the provision of the juvenile court statutes which give the juvenile court exclusive jurisdiction in neglect proceedings¹³¹ deprived the superior court of jurisdiction to act on the parallel habeas corpus petition.¹³²

4. *Termination of Parental Rights in a Custody Dispute*

The limits of a trial court's powers in framing a custody decree are often ill-defined, primarily because appellate review of the trial court's decision is limited to the abuse of discretion test. In *Sanders v. Sanders*,¹³³ however, the Third District Court of Appeals did refuse to permit a trial court to terminate completely the parental rights of both parents in a custody dispute arising in a divorce action. Without discussing the specific facts which led to the decree, the appellate court focused on the trial court's order itself—that the children were to become wards of the state and either be placed in a foster home or be put up for adoption, the parents being denied visitation rights whatever the situation.¹³⁴

¹²⁸*Id.*

¹²⁹*Id.* at 371, quoting from *Scott v. Scott*, 227 Ind. 396, 405-06, 86 N.E.2d 533, 537 (1949).

¹³⁰324 N.E.2d 161 (Ind. Ct. App. 1975).

¹³¹IND. CODE § 33-12-2-3 (Burns 1975).

¹³²324 N.E.2d at 162.

¹³³310 N.E.2d 905 (Ind. Ct. App. 1974).

¹³⁴*Id.* at 906.

The court looked exclusively at the question of whether the trial court had jurisdiction to order permanent termination of parental rights and concluded that the former divorce statute¹³⁵ did not confer such power.

In so holding, the *Sanders* court looked at the other statutory provisions for termination of parental rights, including adoption,¹³⁶ termination of parental rights,¹³⁷ placement of a child of divorced parents in an orphan's home by the trial court under a series of now repealed statutes,¹³⁸ and disposition of a dependent or neglected child under statutes also presently repealed.¹³⁹ The court of appeals concluded that the requisite statutory formalities for each of these procedures had not been complied with; therefore, the trial court could not have based its decree on any of these provisions. Only by exceeding its jurisdiction could the trial court have based its permanent termination of parental rights on the divorce statutes then in force: While the primary focus of a custody dispute is on the child's interest, parental rights are "not cut off by a determination of custody adverse to the parent, and it [the custody award] may serve as a basis for a later award of custody to that parent when the circumstances surrounding the original award have changed."¹⁴⁰

This decision appears correct. The legislature had provided for termination of parental rights only under the most extreme circumstances of abandonment, neglect, or abuse.¹⁴¹ A custody dispute in a divorce action normally contemplates a choice between two parents, not a total severing of the parents' rights. Moreover,

¹³⁵The divorce was granted under the former statutes, ch. 43, §§ 6-12, 14-24, [1873] Ind. Acts 107 (repealed 1973). However, there appears to be nothing in the child custody provisions of the new Dissolution Act, IND. CODE § 31-1-11.5-21 (Burns Supp. 1975), which would change the *Sanders* result, although the new Act does give the court power to order continuing supervision of a specific case by various state agencies to insure that its custody orders are carried out. The court may do so if both parents agree to such supervision or if the court finds the possibility of physical or emotional danger to the child if such an arrangement is not made. *Id.* § 31-1-11.5-21(c).

¹³⁶IND. CODE §§ 31-3-1-1 to -11 (Burns Supp. 1975). These sections require a specific adoption petition, which was not in evidence in the trial court record in *Sanders*.

¹³⁷*Id.* § 31-3-1-7. This section also requires a specific petition, which was likewise not in the *Sanders* trial court record, before parental rights may be terminated.

¹³⁸Ch. 24, §§ 1-3, [1903] Ind. Acts 39 (repealed 1973). These sections required such dispositions to be "specified and recited in the decree of the court." The trial court in *Sanders* made no such recitations.

¹³⁹Ch. 41, §§ 1-4, [1907] Ind. Acts 39 (repealed 1974).

¹⁴⁰310 N.E.2d at 907.

¹⁴¹See the grounds in IND. CODE §§ 31-3-1-1 to -11 (Burns Supp. 1975) and ch. 24, §§ 1-3, [1903] Ind. Acts 39 (repealed 1973).

as the *Sanders* court pointed out, a custody disposition leaves open the possibility of a different disposition later in time. None of the termination statutes allows for the opportunity for a change of the decree subsequent to the original determination. Thus, a complete termination of parental rights in a child is something quite different from the normal determination of the custody of a child when a marriage is dissolved.

D. Child Support

1. College Expenses

In *DeLong v. DeLong*¹⁴² the Second District Court of Appeals resolved a dispute between divorced parents over the extent of the father's duty to pay his daughters' college expenses. On the father's petition to modify the divorce decree, the trial court had ordered the father to pay a sum toward college expenses for his two daughters, subject to a reduction in the amount of support to the extent that scholarships received by the girls covered expenses. The trial court had further ordered that the father's support obligation would cease automatically when each child reached twenty-one. The mother appealed the order, arguing that the trial court's award was an abuse of discretion and contrary to the law and the evidence. She further argued that the decree was vague and uncertain because it was not explicit as to the effect of a daughter reaching age twenty-one in the middle of a semester, as to the possibility of partial scholarship funds, and as to the effect of a trimester program on the order.

The court of appeals affirmed the trial court's judgment, reiterating the principle that broad discretion is vested in the trial court and pointing out with respect to modification of support decrees that the support statute "permits the court, upon proper application, to make whatever adjustments are necessary for the welfare of the children . . . including the cost of post-high school education."¹⁴³ In this vein, the court went on to hold that a trial court may, in the exercise of its discretion, order a parent to provide college expenses for minor children, establish a reasonable amount for expenses, and exert continuing jurisdiction over the minor children and the parents so as to keep such expense amounts in conformity with changing circumstances.¹⁴⁴

¹⁴²315 N.E.2d 412 (Ind. Ct. App. 1974). The petition to modify the divorce decree was filed in July, 1972; therefore, the case was decided on the basis of the now-repealed support statute in the former divorce law. Ch. 43, § 21, [1873] Ind. Acts 107 (repealed 1973).

¹⁴³315 N.E.2d at 417 (citations omitted).

¹⁴⁴*Id.* at 418.

The court also found no fatal lack of clarity with respect to the issues of a daughter reaching twenty-one in mid-semester, since the support for that term would already have been paid; the issue of a partial scholarship, since any partial scholarship funds would reduce but not cut off the father's duty to support; and the trimester problem, since the decree contemplated no summer support obligation.¹⁴⁵

DeLong is an unexceptional case which is not only sound with respect to earlier precedent¹⁴⁶ but also fully compatible with the current Indiana child support provision under the new Dissolution Act. Since 1974, this section has allowed for educational expenses to a child's twenty-first birthday.¹⁴⁷ Therefore, no new development appears forthcoming from the revision of the support statutes under the Dissolution Act.

2. *Uniform Reciprocal Enforcement of Support Act*

The Uniform Reciprocal Enforcement of Support Act¹⁴⁸ provides a useful mechanism for the interstate enforcement of support decrees. The Act permits the use of another state's judicial system to enforce support obligations without forcing the stay-at-home spouse to travel to the other state. For example, the spouse or child to whom the duty of support is owed files a complaint in a court of his or her home state, the initiating state.¹⁴⁹ The complaint is examined only to ascertain whether a claim has been stated, and if a claim has been stated, the complaint is subsequently forwarded to the state in which the spouse who owes the support duty is located, the responding state.¹⁵⁰ The responding state court then may conduct a hearing on the complaint to determine whether a duty of support exists and fix the amount

¹⁴⁵*Id.* at 420.

¹⁴⁶*See, e.g.,* *Lipner v. Lipner*, 256 Ind. 151, 267 N.E.2d 393 (1971); *Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968).

¹⁴⁷The new child support section provides in part: "(b) Such child support order may also include, where appropriate: (1) sums for the child's education in schools and at institutions of higher learning" IND. CODE § 31-1-11.5-12(b) (1) (Burns Supp. 1975). The section continues:

(d) The duty to support a child under this chapter ceases when the child reaches his twenty-first birthday unless:

(1) the child is emancipated prior to his twenty-first [21st] birthday in which case the child support, except for educational needs, terminates at the time of emancipation; however, an order for educational needs may continue in effect until further order of the court

Id. § 31-1-11.5-12(d) (1).

¹⁴⁸IND. CODE §§ 31-2-1-1 to -39 (Burns 1973) [hereinafter referred to as URESA].

¹⁴⁹*Id.* § 31-2-1-10.

¹⁵⁰*Id.* § 31-2-1-14.

of support and order payment once a support duty is determined.¹⁵¹ Payment is usually made through the responding state's court registry.¹⁵² Conflicts may arise, however, when a stay-at-home spouse seeks to use the URESA machinery while an earlier support order exists in the initiating state, since the responding state court is empowered by URESA to decide in the URESA hearing the question of the existence and amount of support owed.¹⁵³

This latter problem was at the center of *Banton v. Mathers*.¹⁵⁴ The husband had been ordered to pay his former wife \$100 per week child support by the Indiana trial court which had also dissolved their marriage. After his move to Oklahoma, the wife, who remained in Indiana, filed a URESA complaint to enforce the husband's support duty. The Oklahoma court, as the responding court, apparently reduced the support order to \$200 per month. A number of years later, the wife sought a contempt citation in Indiana against the husband based on the original \$100 per week Indiana support order, and the husband counter-petitioned for modification of the original decree. While this latest Indiana action was pending, however, the husband asked for and received a modification of the Oklahoma order from \$200 to \$150 per month. When the Indiana proceeding finally was heard, the trial court adopted the second Oklahoma reduction, to \$150 per month, because the Indiana court decided that full faith and credit required adoption of the Oklahoma decree. The Third District Court of Appeals reversed, holding that "[f]ull faith and credit is not applicable to support orders under the Uniform Reciprocal Enforcement of Support Act," and that the Indiana decree "remained in full force until modified by the Indiana court."¹⁵⁵

Banton serves to illustrate one of the singular problems in the area of child support: jurisdiction-shopping. The problem arises from the United States Supreme Court decision, *Sistare v. Sistare*,¹⁵⁶ in which the Court held that support decrees need not be given full faith and credit because such decrees are not the sort of "final order" to which full faith and credit applies.¹⁵⁷ The problem is complicated by the fact that a party like the wife in

¹⁵¹*Id.* § 31-2-1-23.

¹⁵²*Id.* § 31-2-1-26.

¹⁵³*Id.* § 31-2-1-23.

¹⁵⁴309 N.E.2d 167 (Ind. Ct. App. 1974). *Banton* involved child support, but URESA may properly be invoked for any type of support duty. The issue of whether a duty is owing is decided "under the laws of any state where the obligor was present during the period for which support is sought." IND. CODE § 31-2-1-7 (Burns 1973).

¹⁵⁵309 N.E.2d at 168.

¹⁵⁶218 U.S. 1 (1909).

¹⁵⁷*Id.* at 17.

Banton cannot be deemed to have elected the remedy of URESA to the exclusion of any other remedy since URESA plainly states that its remedies "are in addition to and not in substitution for any other remedies."¹⁵⁸ In a less-mobile society, jurisdiction-shopping would not be a problem. In the United States today, however, the *Sistare* principle applied to child support, with the concomitant refusal of the United States Supreme Court to require that full faith and credit be applied in custody actions,¹⁵⁹ has led to the creation of a group of persons who spirit children across state lines and hop from state to state seeking more favorable disposition of custody and support orders.¹⁶⁰

Banton presents an additional observation on the issue of what a spouse to whom support is owed may do. As the court of appeals pointed out in a textual footnote,¹⁶¹ URESA was not necessarily the best choice for the wife to ensure that a foreign court would not tamper with the amount of the original Indiana decree. She might have gone into Oklahoma by way of enforcing the Indiana judgment; while this may not have controlled as to future payments, she should have been able to recover the arrearages. Alternatively, she could have used the URESA machinery simply to register the Indiana decree, without giving the Oklahoma courts virtually de novo powers over the support dispute.¹⁶² Using the conventional URESA procedures as she did, however, it is difficult to accept any argument that the wife should not now be bound by the Oklahoma decree. The Oklahoma court, though, could have applied some consideration of comity to the initial Indiana support order, even in the URESA hearing.

E. Child Neglect and Abuse

In *Howard v. State*¹⁶³ the Third District Court of Appeals reversed a conviction of cruelty and neglect of a child for lack of sufficient evidence. The accused, the stepfather of the deceased

¹⁵⁸See, e.g., IND. CODE § 31-2-1-3 (Burns 1973). The *Banton* court cited a Mississippi decision, *Howard v. Howard*, 191 So. 2d 528 (Miss. 1966), and an Idaho decision, *Despain v. Despain*, 78 Idaho 185, 300 P.2d 500 (1956), as support for the proposition that URESA is a supplementary statute. 309 N.E.2d at 172-73.

¹⁵⁹*May v. Anderson*, 345 U.S. 528 (1953).

¹⁶⁰See the excellent discussion of the custody problem in *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

¹⁶¹309 N.E.2d at 170-71 n.2.

¹⁶²See, e.g., the registration provisions in Indiana's URESA, IND. CODE §§ 31-2-1-32 to -37 (Burns 1973).

¹⁶³319 N.E.2d 849 (Ind. Ct. App. 1974). See Note, *Neglected Children and Their Parents in Indiana*, 7 IND. L. REV. 1048 (1974), for a general discussion of the subject of neglect in Indiana.

child, had had the 2-year-old child in his custody for slightly more than three hours. Around 3 a.m., the stepfather brought the child to a hospital emergency room where an examining physician observed "multiple bruises covering his entire face, his upper arms, his lower arms, his anterior chest, his back, his hips, and his legs, and his lower legs, even including the tops of his feet."¹⁶⁴ The child died the same day he entered the hospital, the cause of death being given as either a "skull fracture or abdominal hemorrhage."¹⁶⁵

Testimony as to the child's condition was in conflict. The child's mother testified that the child had various bruises, but it is difficult to believe that her rather innocuous description of the child's physical state, "[H]e had just other bruises on him,"¹⁶⁶ is consistent with the physician's testimony. Moreover, the physician who conducted the autopsy testified that the injuries were due to force applied with a blunt object."¹⁶⁷ The stepfather gave several conflicting versions of the manner in which the child received his injuries.

While the *Howard* opinion does not raise the point, some jurisdictions permit an inference of child abuse to be drawn from the injuries themselves coupled with a lack of a satisfactory explanation.¹⁶⁸ There seems to have been an inference of abuse drawn in *Howard*, but the evidence did not appear to point conclusively to the stepfather as the perpetrator. For example, there was no evidence whatsoever that the stepfather had ever struck the child, and there was one other child in the house, the 5-year-old brother of the deceased child. Additionally, the injuries occurred from 12 to 24 hours before the child was taken to the hospital, during which time the child "was under the control of several persons other than [the stepfather]."¹⁶⁹ As the court went on to point out, "[a]t most, the evidence shows that [the stepfather], among others, had an opportunity to inflict the in-

¹⁶⁴319 N.E.2d at 850. Severe head injuries were also diagnosed.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 851.

¹⁶⁸See, e.g., *In re Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (Family Ct., Bronx County 1968).

When there is insufficient evidence as to whether or not parents are responsible for a child's injury, an inference of parental abuse or lack of attention may, under special circumstances, be drawn from the injury itself coupled with the lack of explanation (for example, when a young baby has recurrent fractures, explicable only by either blows or serious falls).

Id. at 23, 288 N.Y.S.2d at 207-08. Here again, though, the evidence was not sufficient to indicate abuse on the part of the parent.

¹⁶⁹319 N.E.2d at 851.

juries”¹⁷⁰ Thus, even viewing the evidence most favorably to the state, the court had to reverse the conviction.

F. Parental Control of Medical Treatment

Traditionally parents have been given almost exclusive control over the medical treatment of their children.¹⁷¹ The exceptions to this rule are few and generally operative only when the parent refuses to consent to a necessary life-saving treatment such as a blood transfusion.¹⁷² Some state statutes dispense with the requirement of parental consent, however, when the social consequences of the child's revelation of the ailment to his parents often inhibit disclosure. In this vein, Indiana dispenses with parental consent for venereal disease treatment.¹⁷³ A number of states have also abolished the need for parental consent for contraceptive devices and information.¹⁷⁴ Likewise, several states have developed a “mature minor” role, either by statute or judicial decision, by which minors close to the age of majority may consent to or refuse medical treatment apart from the wishes of the parents.¹⁷⁵

Very few courts have faced squarely the issue of a parent's authority to order treatment which may not benefit the child. The Third District Court of Appeals, in *A.L. v. G.R.H.*,¹⁷⁶ though, did make an effort to deal with just such an issue when it decided that the common law rule of parental control does not extend to the power to order sterilization of a retarded child, at least when such sterilization is not required as a life-saving measure.¹⁷⁷ The

¹⁷⁰*Id.* at 851-52.

¹⁷¹*See, e.g.,* *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921).

¹⁷²*See, e.g.,* *People ex rel. Wallace v. Zabrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). At least one jurisdiction, Iowa, has permitted a court to substitute its judgment for that of the parents in a non-life-threatening situation, however. The case involved parental refusal to consent to a tonsillectomy for their child. *In re Karwath*, 199 N.W.2d 147 (Iowa 1972).

¹⁷³IND. CODE § 16-8-5-1 (Burns 1973).

¹⁷⁴*See* the table and discussion in Paul, Pilpel & Wechsler, *Pregnancy, Teen-agers and the Law*, 1974, 6 FAMILY PLANNING PERSPECTIVES 142, 143 (1974). *See also* Note, *Minors and Contraceptives in Indiana*, 8 IND. L. REV. 716, 723-24 (1975).

¹⁷⁵*See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOOD HALL L.J. 115, 120-22 (1973).

¹⁷⁶325 N.E.2d 501 (1975).

¹⁷⁷*Id.* at 502. Courts have been rather hesitant to approve sterilization as a method of social control. *Compare* *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *with* *Buck v. Bell*, 274 U.S. 200 (1926). After the Nebraska Supreme Court authorized sterilization of a woman inmate as a condition of parole from a state home for the mentally retarded, *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968), the Nebraska legislature reversed the decision by statute.

question arose when the mother filed for a declaratory judgment, seeking court approval of the proposed sterilization; however, the facts presented a surprisingly unpersuasive case for sterilization. The child, a boy 15 years old, was retarded as a result of an automobile accident and had, at the time of the trial, a measured intelligence quotient of 83, normal usually regarded as somewhere around 90.

There was no indication whatsoever that any of the child's retardation was genetic; thus, he would not pass on the retardation to his children. Moreover, there was an inference drawn that the boy's intelligence was improving since his intelligence quotient two years before trial had been 65, nearly 20 points lower than at the time of trial. Apparently the nub of the mother's desire to have her son sterilized lay in the fact that he "had become interested in girls," and that since his social contact was mainly with handicapped children in his class, any sexual activity on his part ran the risk of impregnation of one of the handicapped girls in his class.¹⁷⁸

The trial court had denied the mother's request. The court of appeals, in a somewhat confused holding, affirmed by pointing out that

the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child, or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.¹⁷⁹

Having ostensibly disposed of the case on this factual basis, the court nevertheless went on to state categorically that "the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."¹⁸⁰ In so holding, the court cited two cases, one from Missouri¹⁸¹ and the other from California,¹⁸² both of which held that the juvenile statutes did not validly give courts

NEB. REV. STAT. § 83-218 (1969). The Indiana sterilization laws have also been repealed. Ch. 241, §§ 1-6, [1927] Ind. Acts 713 (repealed 1974); ch. 244, §§ 1-2, [1937] Ind. Acts 1164 (repealed 1974); ch. 227, §§ 1-2, [1951] Ind. Acts 649 (repealed 1974).

¹⁷⁸325 N.E.2d at 502. The sterilization procedure involved was a vasectomy which, as the court pointed out, is "simple, virtually painless and irreversible." *Id.*

¹⁷⁹*Id.* (citations omitted).

¹⁸⁰*Id.*

¹⁸¹*In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974).

¹⁸²*In re Kemp's Estate*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

the power to authorize sterilization of retarded minor females in the absence of more specific legislation.

Once the appellate court chose to enter into this additional discussion, it might have elaborated a bit more on this aspect of the decision since the language used applies to a situation somewhat broader than the facts. If sterilization is impermissible on the relatively nonthreatening facts of this case, the question remains whether it is necessarily outside the scope of parental authority when the retardation is genetic in origin, thereby being capable of being passed on to offspring, or when the record shows an established course of sexual misconduct on the child's part. The decision might better have been restricted to the rather special facts involved here—clearly this boy's situation did not warrant the drastic step of a vasectomy. The language as to the scope of common law parental authority may now be extended to other important areas of medicine, such as nontherapeutic medical experimentation, where the distinctions are not quite so clear. It is presently questionable, after *A.L. v. G.R.H.*, whether parents of a minor may agree to any medical experimentation on a child if the research is not directly beneficial to the child, but simply beneficial to society as a whole. In the final analysis, this entire area of medical treatment of children is in dire need of legislative clarification.

G. Parental Tort Immunity

Although the Indiana Supreme Court abolished the doctrine on interspousal tort immunity three years ago,¹⁸³ the First District Court of Appeals, in *Vaughan v. Vaughan*,¹⁸⁴ refused to extend that decision to the issue of the immunity of parents from suits by their children. *Vaughan* involved a grandfather who brought a personal injury action on behalf of his 4-year-old grandson against the boy's parents. The suit alleged that the parents had been negligent in supervising the child while on a visit to a cemetery where the boy had suffered head injuries caused by a falling tombstone. The trial court dismissed on two grounds, parental immunity and failure to state a claim upon which relief could be granted. The grandfather then filed a motion to correct errors which sought "an abrogation of the doctrine of parental immunity in Indiana."¹⁸⁵

¹⁸³*Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972). See 6 IND. L. REV. 558 (1973) for a general discussion of *Brooks* and the abrogation of the common law doctrine of interspousal tort immunity.

¹⁸⁴316 N.E.2d 455 (Ind. Ct. App. 1974).

¹⁸⁵*Id.* at 456.

The court of appeals affirmed the trial court's judgment. The court, in a deliberately concise opinion,¹⁸⁶ avoided virtually all of the policy arguments for or against the doctrine of parental immunity and disposed of the case by distinguishing the abrogation of spousal immunity in *Brooks v. Robinson*¹⁸⁷ from the doctrine of parental immunity attacked here. In doing so, the court focused on two portions of the *Brooks* opinion. The first—the supreme court's rejection of the notion that husband-wife suits would promote “fraud, collusion and trivial litigation”¹⁸⁸—was similarly rejected by the court of appeals as an argument for maintaining parental immunity.

The court refused, however, to accept as a controlling analogy the second portion of the *Brooks* opinion, which rejected the argument that such suits would have a disruptive effect on family harmony. Instead, the court reaffirmed “the seemingly ageless observation”¹⁸⁹ contained in *Smith v. Smith*,¹⁹⁰ a 50-year-old landmark decision establishing parental immunity in Indiana. Unfortunately, *Smith* was essentially a policy decision by the court of appeals which seems to have rested on rather antiquated reasoning based on judicial notice of the then existing social conditions. The *Smith* court had reasoned: “From our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority”¹⁹¹ Although the *Smith* court had recognized a possible exception to the immunity doctrine, that of extreme circumstances, the *Vaughan* court refused to hold that mere failure to supervise brought the case within that exception.

The court also rejected the arguments that the doctrine of parental immunity was an unconstitutional denial of both equal protection and access to the courts. The equal protection claim was disposed of by holding that the classification which gave parents immunity was reasonable for several reasons: “Unity of interest of parent and child, no truly adversary situation, [and

¹⁸⁶The court noted:

It [the court] does recognize, however, that the question has been widely litigated as well as receiving the attention of numerous scholars. Any substantial discussion on our part of the sub-issues (changing social values, parent-child relationship, etc.) could not significantly add to what already exists, and only serve the course of redundancy.

Id. at 456 n.1.

¹⁸⁷259 Ind. 16, 284 N.E.2d 794 (1972).

¹⁸⁸*Id.* at 21, 284 N.E.2d at 796.

¹⁸⁹316 N.E.2d at 457.

¹⁹⁰81 Ind. App. 566, 142 N.E. 128 (1924).

¹⁹¹*Id.* at 570, 142 N.E. at 129.

the] difficulty of dissolving the relationship and prevention of family discord”¹⁹² The access-to-the-courts argument was premised on the provision of the Indiana Constitution giving “every man” a legal remedy for personal injury.¹⁹³ Although the *Brooks* decision used this constitutional provision as additional support for its holding, the *Vaughan* court linked the supreme court’s invocation of this provision to its statement that “the reasoning advanced for retention of the doctrine [interspousal immunity] is judicially unsound”¹⁹⁴ The constitutional provision was inapposite in *Vaughan*, according to the court of appeals, because they believed “the doctrine of parental immunity to be judicially sound.”¹⁹⁵

As noted above, the court deliberately shortened its discussion of the issues on the ground that further elaboration would be redundant. While not categorically improper, it is highly dubious to use this technique in a case involving a frontal attack on a shaky principle of law, one that is fast eroding throughout the country. The technique is particularly troublesome when an analogous doctrine has been abrogated by a higher court and the only support for affirming the continuance of the present rule is found in an old decision, grounded on neither statute nor common law—a decision which disposes of an important argument by judicial notice of “the tendencies of the unrestrained youth of this generation.”¹⁹⁶

In *Vaughan* the question was thoroughly briefed by both sides and deserved a much more thorough analysis by the court. Indeed, much of the opinion, albeit sub silentio, appears to reflect the third district’s basic policy disagreement with the supreme court’s abrogation of interspousal immunity.¹⁹⁷ There may be some validity to the basic proposition advanced—that parent-child suits disrupt family harmony; however, this proposition is based on two factors which deserve more discussion. First, there should be some empirical evidence that disruption of the family in fact does occur when the parental immunity doctrine is abrogated. This, clearly, is not the place for unrestrained judicial notice. Secondly, there

¹⁹²316 N.E.2d at 457.

¹⁹³IND. CONST. art. 1, § 12. This section provides: “All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law”

¹⁹⁴259 Ind. at 24, 284 N.E.2d at 798.

¹⁹⁵316 N.E.2d at 457. See generally Note, *Parental Tort Immunity Doctrine in Indiana*, 8 IND. L. REV. 394 (1974).

¹⁹⁶*Smith v. Smith*, 81 Ind. App. 566, 570, 142 N.E. 128, 129 (1924).

¹⁹⁷Note, for example, the rather grudging statement leading into the quotation from *Smith*: “Assuming for the moment that nuptial peace and harmony no longer requires judicial enforcement” 316 N.E.2d at 457.

should be a recognition of the fact that disposition of this case requires judicial policymaking, and thus, that the policy arguments must be squarely faced. Rather than strengthening the parental immunity doctrine, the *Vaughan* decision actually appears to have weakened it because the court refused to grapple with the difficult questions posed.

H. Waiver of Juveniles to Criminal Court

In one of the few major statutory developments in domestic relations this survey period, the Indiana General Assembly enacted a new statute revising the provisions under which a juvenile accused of a criminal act is waived into the adult criminal process.¹⁹⁸ One revision is in Indiana Code section 31-5-7-3,¹⁹⁹ which changes the definition of "child" by specifically excluding from the definition in subsection (b) (1) "a person who is charged with first degree murder," in subsection (b) (2) a youth sixteen or over who is charged with a traffic offense, and in subsection (b) (3) a person who has been waived by the new waiver provisions. Thus, under the new statute, a person charged with first degree murder, irrespective of age, will be tried as an adult.

As revised, the waiver statute, Indiana Code section 31-5-7-14,²⁰⁰ establishes two broad categories of youthful offenders. Section (a) establishes the first category which includes persons 14 years of age or older. For minors coming under this category, the statute permits waiver at the discretion of the judge upon a motion by the prosecutor after investigation and hearing, *if* the court makes certain specific findings. The court first must determine that "the offense has specific prosecutive merit"²⁰¹ The court then must make one of three alternative findings:

- (1) That the crime "is heinous or of an aggravated character" giving greater weight to crimes against person;²⁰²
- (2) that the crime is "part of a repetitive pattern of juvenile offenses;"²⁰³ or
- (3) that "it is in the best interest of the public welfare and for the protection of the public security gen-

¹⁹⁸Ind. Pub. L. No. 296 (Apr. 25, 1975) (codified in (Burns Supp. 1975)), *amending* IND. CODE §§ 31-5-4-2, -3; -7-3, -4, -13, -14, -15, -23 (Burns 1973).

¹⁹⁹IND. CODE § 31-5-7-3 (Burns Supp. 1975).

²⁰⁰*Id.* § 31-5-7-14.

²⁰¹*Id.* § 31-5-7-14(a).

²⁰²*Id.* § 31-5-7-14(a) (1).

²⁰³*Id.* § 31-5-7-14(a) (2).

erally that the juvenile be required to stand trial as an adult offender.”²⁰⁴

The second category under section (b) consists of youths 16 or older who are charged with specified felonies.²⁰⁵ A waiver in this situation is mandatory, not permissive, after the prosecutor’s motion and investigation. The word “hearing” is not included in this section; therefore, unless this omission is inadvertent, there need be no hearing at all under this category. It is arguable, though, that the omission of “hearing” was not intended because the court has the power to prevent waiver by making the requisite negative “findings.” Findings, of course, usually indicate some type of hearing. Specifically, the court must make a negative finding of all the following:

- (1) That the crime “is not heinous or of an aggravated character;”²⁰⁶
- (2) that the crime “is not a part of a repetitive pattern of juvenile offenses;”²⁰⁷ and
- (3) that “it would be in the best interest of the child and of public welfare and public security for the juvenile to remain with the regular statutory juvenile system.”²⁰⁸

A substantial part of the language of the new waiver provisions is an attempt to codify much of the language in *State ex rel. Atkins v. Juvenile Court*²⁰⁹ and *Summers v. State*.²¹⁰ However, waiver in those cases remained discretionary, while waiver for 16-year-olds accused of serious felonies is virtually assured by the new statute. If a juvenile judge is willing to make only one of the specified findings, sizeable numbers of 14-year-olds also may find their way into the adult criminal system.

To a certain extent, moving juveniles into the adult system merely gives them additional procedural protections not available in the juvenile system.²¹¹ However, one of the aspects of the juvenile system, wide discretion in the disposition of the child after

²⁰⁴*Id.* § 31-5-7-14(a) (3).

²⁰⁵These felonies include: “second degree murder, voluntary manslaughter, kidnapping, rape, malicious mayhem, armed robbery, robbery, first degree burglary, aggravated assault and battery, or assault and battery with intent to commit any of the felonies in this subsection.” *Id.* § 31-5-7-14(b).

²⁰⁶*Id.* § 31-5-7-14(b) (1). This provision also retains the offenses against person/offenses against property distinction.

²⁰⁷*Id.* § 31-5-7-14(b) (2).

²⁰⁸*Id.* § 31-5-7-14(b) (3).

²⁰⁹252 Ind. 237, 247 N.E.2d 53 (1969).

²¹⁰248 Ind. 551, 230 N.E.2d 320 (1967).

²¹¹See the classic cases of *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no jury trial requirement for juveniles), and *In re Gault*, 387 U.S. 1 (1967) (discussion of juvenile system defects).

conviction, will be lost. Also, the "public welfare" and "public security" grounds for waiver appear overly broad and virtually undefinable. The total abolition of juvenile court jurisdiction over all persons accused of first degree murder by way of changing the definition of "child" to exclude such cases may, ultimately, prove both absurd and tragic in those cases of very young children who stand accused of murder. It is at least technically possible under the new statute for a 10-year-old child to be tried for murder in adult court and, upon conviction, to be imprisoned with adults.²¹²

I. Paternity

In two paternity actions, separate Indiana courts of appeals recently reaffirmed the principle that the mother bears the burden of proving paternity. In *E.G. v. M.B.*²¹³ the Second District Court of Appeals, affirming a negative judgment for the putative father, held that the test on appellate review for reversing a negative judgment of paternity is not a question of whether there is an absence of "sufficient evidence" to support the decision but rather "whether it [the evidence] is without conflict and leads to but one conclusion, which is contrary to the conclusion reached by the trial court."²¹⁴ Here, there was a substantial amount of conflicting, inconsistent testimony. The actual gestation time was unclear, and the putative father had testified that he was only one of several persons to have sexual relations with the petitioner during the critical time period. Since the evidence had to be viewed in the light most favorable to the appellee-putative father,²¹⁵ the negative judgment of paternity by the trial court had to stand. Even the mother's evidence that the putative father had visited the mother after birth and bought the infant some clothing was insufficient proof to overcome the other conflicting evidence and support a finding of paternity.²¹⁶

By way of contrast, the First District Court of Appeals affirmed a declaration of paternity in *O.Q. v. L.R.*²¹⁷ In *O.Q.* the court had to determine the applicability of the rules of civil procedure to a paternity action when the rules were in conflict with a procedural requirement found in the statutes regulating a pater-

²¹²IND. CODE § 31-5-7-23 (Burns Supp. 1975) provides that: "No child shall be detained in any prison, jail or lockup" However, a child tried for murder is now excluded from the definition of child. *Id.* § 31-5-7-3(b) (1).

²¹³326 N.E.2d 858 (Ind. Ct. App. 1975).

²¹⁴*Id.* at 859.

²¹⁵*Id.*

²¹⁶*Id.* at 860. The appellate court indicated, however, that such evidence alone might be enough to affirm a judgment of paternity if there had been one on those facts.

²¹⁷328 N.E.2d 233 (Ind. Ct. App. 1975).

nity action. The paternity statute²¹⁸ purportedly required the losing party to file a motion for a new hearing within 30 days of the verdict.²¹⁹ Here, the defendant, as the losing party, had merely filed a motion to correct errors within the 60-day period prescribed by Trial Rule 59(C). The court of appeals resolved the conflict in favor of Trial Rule 59, holding that the paternity statute "has been superseded to the extent that it can be construed to require the filing of a petition for a new hearing as a condition precedent to appeal."²²⁰ The preservation of the right to appeal is thus governed by a timely-filed motion to correct errors.²²¹

Although the defendant-putative father won the procedural dispute, the appellate court affirmed the finding of paternity on the evidence. The plaintiff had testified to sexual relations with the defendant around the approximate time of conception and further had asserted that she had not had relations with anyone other than defendant during that period. In affirming the judgment of paternity below, the court quoted from some older cases to establish a distinction between an act of intercourse plus the *probability* of conception at the time of that act, which will support a finding of paternity, and an act of intercourse plus only the *possibility* of conception at the time of the act, which will not support a paternity finding.²²² Since a physician had testified that the probable date of conception had been five days earlier than the first asserted sexual relations, the defendant had argued that the five day discrepancy established, at best, the mere *possibility* of conception. The court quickly disposed of that contention, however, by pointing out that "[t]he period of gestation in the case at bar falls well

²¹⁸IND. CODE § 31-4-1-18 (Burns 1973).

²¹⁹*Id.* Section 31-4-1-18 provides:

If the finding of the court, or the verdict of the jury, be for or against the defendant, the party aggrieved thereby may file a motion for a new hearing within thirty [30] days after such finding or verdict Otherwise the procedure on appeal shall be the same as is provided for by law and rules for appeal for civil cases.

²²⁰328 N.E.2d at 235. The court of appeals relied on an Indiana Supreme Court case, *City of Mishawaka v. Stewart*, 310 N.E.2d 65 (Ind. 1974), which dealt with a problem in a similar context: a 10-day period in which to file a petition for rehearing of a disciplinary case was not permitted to be a condition precedent for appeal under Trial Rule 59(C).

²²¹The court acknowledged Trial Rule 4, which provides that the Indiana rules of civil procedure "shall supercede all procedural statutes in conflict therewith." The First District Court of Appeals had already held that paternity actions are civil in nature. *Cohen v. Burns*, 149 Ind. App. 604, 274 N.E.2d 283 (1971). The Second District Court of Appeals had previously held that paternity suits are governed by the Indiana Rules of Procedure. *Houchin v. Wood*, 317 N.E.2d 911 (Ind. Ct. App. 1974).

²²²328 N.E.2d at 236, *citing* *Roe v. Doe*, 289 N.E.2d 528 (Ind. Ct. App. 1972); *Beamon v. Hedrick*, 146 Ind. App. 404, 255 N.E.2d 828 (1970).

within the normal range of probability.”²²³ Thus, the inference of conception fell within the probable, rather than the merely possible, category, and the adjudication of paternity had to be affirmed.²²⁴

J. Guardianship

In *Guardianship of Carrico v. Bennett*,²²⁵ the Third District Court of Appeals affirmed in an appeal on the evidence a denial of a petition to terminate a guardianship. The court also examined the question whether the petitioner might properly recover attorney’s fees even though her petition to terminate guardianship was denied. Mrs. Carrico, the petitioner, was an elderly lady under the guardianship of her son. There was considerable conflicting testimony at the termination hearing, but an expert, Mrs. Carrico’s psychiatrist, testified that she was competent. There apparently was no expert testimony in opposition to the petition, even though the son did testify that his mother, while often rational, had periods when she was disoriented and incompetent. As a rebuttal witness, the ward, Mrs. Carrico, gave rather mixed testimony in which she accused her son of instituting the guardianship “so he could get her property.”²²⁶

In reviewing the evidence, the appellate court pointed out that the petitioner had the burden of proving that she was no longer incapable of managing her property and caring for herself. The court also reiterated the rule that lay testimony is admissible in questions of insanity and incompetence and may be weighed along with expert testimony. In looking at all the testimony, both lay and expert, the court concluded: “While such evidence may be susceptible to more than one ultimate inference, we cannot say it led solely to the conclusion that Mrs. Carrico was capable of managing her affairs and caring for herself.”²²⁷ In so holding, the court refused to pass on the argument made by Mrs. Carrico that mere old age or physical infirmity is not sufficient to support a decree of guardianship.

The court disposed of the second major issue, attorney’s fees, much less quickly. The question revolved around the statute which provides for a petition for a adjudication of competency.²²⁸ That

²²³328 N.E.2d at 236. See *E.F. v. G.H.*, 290 N.E.2d 795 (Ind. Ct. App. 1972) (finding that a 290-day period of gestation was not improbable, and implying that the bounds of gestation periods are not yet scientifically established).

²²⁴Again, the appellate court must view the evidence in a light most favorable to the appellee—here the mother—since there was a judgment of paternity below. 328 N.E.2d at 235.

²²⁵319 N.E.2d 625 (Ind. Ct. App. 1974).

²²⁶*Id.* at 627.

²²⁷*Id.*

²²⁸IND. CODE § 29-1-18-48 (Burns Supp. 1975).

statute expressly provides that the ward who is adjudged still incompetent shall pay "the expenses of such proceeding" if "the proceeding was brought in good faith."²²⁹ The trial court had denied Mrs. Carrico's motion to recover her attorney's fees and expenses, apparently without stating reasons for the denial. In passing on this portion of her motion to correct errors, the appellate court wisely examined the policies underlying guardianship proceedings, quoting a 1965 Indiana Supreme Court decision which "recognized the public necessity for insuring the ability of a person to contest his, or her, asserted incompetence."²³⁰ The *Carrico* court went on to hold that the word "expenses" in this statute included "reasonable attorney's fees incurred in maintaining the proceeding."²³¹ An inability to secure attorney's fees in this type of action, the court stated, "would greatly restrict the ability of one adjudged incompetent to seek a restoration of competency . . ."²³² The appellate court therefore remanded for an express finding of good faith since the trial court had made no finding of good or bad faith under the "expenses" portion of the statute, and there was no such evidence on the record.²³³

To the extent that the statute permits recovery of expenses for a petition to set aside a earlier declaration of incompetence, it should fulfill the purpose assigned it by the court. The requirement of good faith, however, appears to be somewhat ill-considered, when the ward is the petitioner. A finding of incompetence and a decree of guardianship necessarily require a finding that the ward does not have the present mental ability to cope with day-to-day affairs. For example, in Mrs. Carrico's case, there was evidence that she was sometimes disoriented, had lapses of memory, and made occasional, unwarranted accusations. In other words, incompetents often act irrationally. It is questionable how a court may hope to make a valid finding as to the ward's state of mind under the "expenses" portion of the statute—whether the ward

²²⁹*Id.* This implies that the estate of the ward would pay the expenses since the statute continues to provide that, if the proceeding was brought in bad faith "[t]he court shall give judgment therefore [for the expense of the proceedings] against the person filing such petition." *Id.* The ward pays for the expense through his or her estate. In this case, it happened that the person bringing the proceeding was the ward herself, and the person in charge of the estate, who must pay on behalf of the estate, was her guardian, her son. The son hoped to shift the expenses from the ward, as represented by her estate, to the ward personally, as a person who brought the proceeding without good faith.

²³⁰319 N.E.2d at 629, citing *State ex rel. Koch v. Vanderburgh Probate Court*, 246 Ind. 139, 203 N.E.2d 525 (1965).

²³¹319 N.E.2d at 629.

²³²*Id.*

²³³*Id.* at 630.

(petitioner) acted in good faith or bad faith—when by previous decree the ward's mental processes are inferior to those of competent persons. It is one thing to weigh state of mind for the initial competency proceeding, but it is wholly inane to suppose that an incompetent ward makes good faith decisions in the same manner as a competent person. Moreover, it does little good to leave the good faith/bad faith decision to the ward's attorney who, by misjudging the ward's state of mind, loses his fees.²³⁴

There is obviously no perfect solution to the problem. Clearly, multiple, unwarranted petitions by wards may result in the "profligate consumption of their estate."²³⁵ However, the alternative jeopardizes the prerogative of a ward to challenge the original declaration when he believes himself competent. The Indiana statute, by forbidding new petitions earlier than six months after a determination of incompetency,²³⁶ is one means of balancing the merits of each consideration. Beyond this, there are practical controls apart from the spurious "good faith" test. A clearly incompetent ward will not be able to show evidentiary support for his assertion beyond his own statements. Few attorneys would be willing to expend time and energy on such a case. However, even if these controls were inadequate, the fact remains that the law simply does not favor guardianships. The Indiana Supreme Court has indicated: "[T]he law should be liberally construed . . . to allow the presentation . . . on behalf of the alleged incompetent."²³⁷ If this policy results in a few instances of "profligate consumption," the error is simply one society ought to be willing to suffer in order to ensure the expeditious termination of guardianships of wards who become competent.

²³⁴If it is adjudged that the petitioner, who happens to be the ward, brought the proceeding in bad faith, the ward, vis-à-vis his estate, will not be liable for the attorney's fees. Since the ward, as petitioner, may have no assets in his personal capacity, the attorney is going to be without his fee.

²³⁵319 N.E.2d at 629.

²³⁶IND. CODE § 29-1-18-48 (Burns Supp. 1975).

²³⁷State *ex rel.* Koch v. Vanderburgh Probate Court, 246 Ind. 139, 141, 203 N.E.2d 525, 526 (1965).

X. Evidence

William Marple*

A. Hearsay

1. Prior Inconsistent Statements

A clear departure from the traditional hearsay rule was announced by the Indiana Supreme Court in *Patterson v. State*.¹ The supreme court affirmed the trial court which had allowed the prior inconsistent statements of two witnesses for the State to be introduced not only for purposes of impeachment but also as substantive evidence. Although disclaiming any abandonment of the hearsay rule, the supreme court said that it was making a "clear pronouncement of our departure from an ancient application of the hearsay rule"²

The defendant in *Patterson* was convicted of involuntary manslaughter. At trial two witnesses called by the State had given signed statements to the police immediately following the homicide. On direct examination the testimony of one of the witnesses differed in a minor aspect from her prior statement. This testimony, since it surprised the State, allowed the prosecuting attorney to offer the pretrial statement—apparently for impeachment pur-

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The author wishes to thank Phyllis McGurk for her assistance in preparing this discussion.

¹324 N.E.2d 482 (Ind. 1975).

²*Id.* at 484. The traditional rule, still followed in most jurisdictions, is that a witness' prior inconsistent statements are hearsay and, as such, are inadmissible as substantive evidence unless they fall within one of the exceptions to the hearsay rule. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 251, at 601 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. The traditional rule has been subjected to increasing attack in recent years. *Id.* The attack gained momentum when the Model Code of Evidence abandoned the traditional rule. MODEL CODE OF EVIDENCE rule 503(b) (1942). Support for the minority rule soon appeared in court decisions. See, e.g., *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); *Thomas v. State*, 186 Md. 446, 47 A.2d 43 (1946). The constitutionality of the rule adopted in *Patterson* was tested and upheld by the Supreme Court of the United States in *California v. Green*, 399 U.S. 149 (1970). Indiana's adoption of the minority rule was intimated in a prior case. *Skaggs v. State*, 293 N.E.2d 781 (Ind. 1973). In *Skaggs* out-of-court assertions were categorized on the basis of whether or not the asserter was presently available for cross-examination. The *Skaggs* court observed that in all previous cases where the asserter was unavailable, the prior statement had been excluded.

poses. The trial court admitted the statement over the defendant's objection and did not instruct the jury that the prior statement should be considered for impeachment purposes only. On cross-examination of the other witness, defense counsel confronted her with excerpts from her prior written statement. On redirect the trial court permitted the State to introduce the entire written statement.

The supreme court began its analysis by repeating what it considered to be the accepted definition of hearsay:

Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, *and thus resting for its value upon the credibility of the out-of-court asserter.*³

The supreme court found that the absence of the asserter during the trial was the crucial factor in the rule excluding statements made out of court. In *Patterson*, since each declarant was present and on the stand when her prior statement was offered, her credibility, both prior and present, was subject to cross-examination at trial. The supreme court said "there was no reason to reject the statements, as substantive evidence, simply because they had been made at a time when the witnesses were not subject to cross-examination."⁴

The practical significance of this new rule of evidence is that the State can survive a motion for acquittal at the close of its case, even when its witnesses, because of intimidation or for other reasons, change their stories at trial. Previously, the prior inconsistent statements could not be considered as evidence on a motion for a directed verdict, and the State would have failed to establish a *prima facie* case.⁵ Prior inconsistent statements will now be considered as substantive evidence by the appellate courts in their view of the "evidence most favorable to the state." The new rule

³324 N.E.2d at 484, *quoting from* *Harvey v. State*, 256 Ind. 473, 476, 269 N.E.2d 759, 760 (1971) (emphasis added by the *Patterson* court). The definition is that of Dean McCormick. MCCORMICK § 225, at 584.

⁴324 N.E.2d at 484-85. The Indiana Supreme Court pointed out that its position is in accord with, but more liberal than, that of other authorities. *Id.* at 485, *citing* MCCORMICK § 251; 3A J. WIGMORE, EVIDENCE § 1081 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]; UNIFORM RULE OF EVIDENCE 63(1); MODEL CODE OF EVIDENCE rule 503(b) (1942).

⁵*United States v. Rainwater*, 283 F.2d 386 (8th Cir. 1960) (directed verdict); *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967) (prior inconsistent statements of one defendant are not admissible against co-defendant). See generally *Beaver & Biggs, Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

is also applicable to civil cases although the problem of turncoat witnesses is not as significant as in criminal cases.

This new rule in Indiana was adopted with reference to Federal Rule of Evidence 801(d)(1), which provides that a prior statement is not hearsay if the declarant testifies and is subject to cross-examination. The federal rule further requires that the prior statement be inconsistent with the witness' present testimony and have been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."⁶ The supreme court noted, however, that the Advisory Committee on the Proposed Federal Rules of Evidence thought the requirement of an oath was unnecessary.⁷ The court concluded that the availability of the declarant for cross-examination is the "safeguard [that] is of paramount importance and is adequate."⁸

Justice DeBruler, dissenting, stated the fear expressed by the majority of courts which have considered this issue in the past—that the party against whom the prior statement is offered will be deprived of meaningful cross-examination of the statement.

Under the principle created by the majority, the cross-examination . . . by necessity will focus on the recollection of the witness of the circumstances in which the statement was made rather than upon the recollection of the witness of the events described in the statement.⁹

Justice DeBruler concluded that cross-examination is meaningful only if the cross-examiner can probe the witness' present recollection of the relevant events.¹⁰

The approach of the dissent hypothesizes a speculative prejudice to a defendant in a criminal case. Two commonsense reasons support the approach of the majority in *Patterson*. Both reasons

⁶FED. R. EVID. 801(d)(1) provides in part:

A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive

⁷324 N.E.2d at 485. See Proposed Fed. R. Evid. 801(d) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972).

⁸324 N.E.2d at 485.

⁹*Id.* at 488 (DeBruler, J., dissenting).

¹⁰*Id.* Justice DeBruler cited the reader to a "helpful discussion of the problems surrounding the use of former statements of witnesses as substantive evidence." *Id.* at 489 n.1, referring to Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

make it more likely that a trial will arrive at the truth. First, prior inconsistent statements, in any event, come into evidence on the issue of the witness' credibility. A limiting instruction is "a mere verbal ritual."¹¹ As Judge Friendly so persuasively pointed out:

To tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable.¹²

Secondly, whether or not the prior inconsistent statement is more likely to be true because it was made nearer in time to the matter to which it relates, the jury can presently observe the demeanor of the witness under the pressure of cross-examination. "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court."¹³

2. Admissions of a Party

In *Jethroe v. State*¹⁴ the defendant was convicted of the murder of his girl friend with whom he had lived for about two years. At trial the defendant contended that the killing was in self-defense. The deceased's daughter, a witness for the State, testified that on the day of the killing the deceased telephoned the defendant's mother in the defendant's presence and asked her to come and move the defendant out of the house. The deceased also stated in this telephone conversation, "Jethroe said he is going to kill me before Friday."¹⁵ Defendant then "snatched" the phone from the deceased and told the person on the line not to come over.

On appeal the defendant contended that this testimony was hearsay.¹⁶ The supreme court held that the accusation and reply were admissible "as a tacit or adoptive admission" since the defendant was present at the time the deceased's statement was made

¹¹C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 39, at 77 (1954), quoted in Beaver & Biggs, *supra* note 10, at 321.

¹²United States v. De Sisto, 329 F.2d 929 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 979 (1964).

¹³Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925) (Hand, J.). Accord, Proposed Fed. R. Evid. 801(d) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972); MCCORMICK § 251, at 602-03.

¹⁴319 N.E.2d 133 (Ind. 1974).

¹⁵*Id.* at 137.

the State made no objection to the issue in its brief. *Id.* at 138.

¹⁶Although the hearsay issue was not properly preserved for appeal,

and his reply and conduct were equivocal.¹⁷ The court said that “[t]he defendant should ask for instructions to the effect that, if the jury finds defendant’s response to be a denial, they should ignore the testimony entirely.”¹⁸

In *Matthew v. State*,¹⁹ a case that is clearly wrong in its application of the undisputed law to the facts, the Third District Court of Appeals held that evidence of the defendant’s testimony before the grand jury was not admissible as an admission by conduct because the “state did not succeed in establishing the truth as to the antithesis” of the defendant’s grand jury testimony.²⁰ The defendant was convicted of reckless homicide while driving under the influence of alcohol. The defendant testified before the grand jury that he had dinner at the home of his secretary on the night in question and that he had nothing to drink while there. At trial his secretary testified that she had supported this story before the grand jury because the defendant impliedly threatened to fire her, but that in fact her grand jury testimony was not true—the defendant had not had dinner at her house. This testimony was important because there was evidence that the defendant had drunk three martinis in the afternoon and two drinks after the alleged dinner. The interjection of the full dinner between drinks would, of course, have lessened the impact of the alcohol on his body and have tended to negate the evidence that he was intoxicated at the time of the fatal accident.²¹

Both the majority, and Judge Garrard who dissented, agreed that *Wilson v. United States*²² correctly established that a defend-

¹⁷*Id.* The court pointed out that testimony about the deceased’s statement standing alone would have been excluded as hearsay.

When a criminal accusation is made in the presence of the person accused, the person’s silence or failure to contradict or explain the statement may be proved as an admission. The circumstances must be such as to afford him an opportunity to speak and such as would naturally call for some action or reply from persons similarly situated. *Robinson v. State* 309 N.E.2d 833 (Ind. Ct. App. 1974), *aff’d*, 317 N.E.2d 850 (Ind. 1974), *noted in* Marple, *Evidence - Criminal*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 186, 208 (1974) [hereinafter cited as 1974 *Survey of Indiana Law*]; *Diamond v. State*, 195 Ind. 285, 144 N.E. 466 (1924). Since the most important element of this rule is the accused’s failure to deny, the equivocal response may be used as an admission. MCCORMICK § 270, at 652.

¹⁸319 N.E.2d at 139.

¹⁹318 N.E.2d 594 (Ind. Ct. App. 1974) (third district).

²⁰*Id.* at 596.

²¹There was no breathalyzer test given.

²²162 U.S. 613 (1896).

Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right, not only to take such statements into consideration, in connection with

ant by giving a false statement about a matter in litigation gives reason for believing he is guilty—in effect an admission by conduct. The majority was correct that the State in *Matthew* did not prove the “antithesis” of the defendant’s story—that the defendant engaged in the consumption of alcohol during the time he said he was having dinner at the home of his secretary. The State did, however, prove that he did not have dinner at the home of his secretary and, therefore, the consumed alcohol would have had a greater effect on him. The majority’s conclusion, that the antithesis of having dinner is consuming alcohol rather than *not* having dinner, is simply illogical factually. It is unclear whether the case is an attempt to limit the use of admissions by conduct against a defendant who does not testify at trial.

3. *State of Mind Exception*

In *Oberman v. Dun & Bradstreet Inc.*,²³ a suit for libel, the plaintiff, a prospective purchaser of real property, testified at trial to a telephone conversation wherein the owner of the property told the plaintiff that he would not sell or lease him the property because of an unfavorable and allegedly false credit report given by the defendant Dun & Bradstreet. The sole issue was whether the owner refused to sell the property because of the credit report, and this testimony was the only evidence favorable to plaintiff on the issue. The Seventh Circuit Court of Appeals held that the conversation with the owner was hearsay, “but under the state of mind exception to the hearsay rule, an out of court declaration of a present existing motive or reason for acting is admissible, even though the declarant is available to testify.”²⁴ The court cited the then proposed Federal Rule of Evidence 803(3)²⁵ and the famous *Mutual*

all the other circumstances of the case, in determining whether or not defendant’s conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defence made or procured to be made, as in themselves tending to show guilt.

Id. at 620-21, *quoted in* *Matthew v. State*, 318 N.E.2d 594, 596 (Ind. Ct. App. 1974). *Accord*, *Perfect v. State*, 197 Ind. 401, 141 N.E. 52 (1923); McCORMICK § 237, at 661 (stating that the “spoiliation” admissions should “entitle the proponent to an instruction that the adversary’s conduct may be considered as tending to corroborate the proponent’s case generally, and as tending to discredit the adversary’s case generally.”).

²³507 F.2d 349 (7th Cir. 1974).

²⁴*Id.* at 351.

²⁵Proposed Fed. R. Evid. 803 provided in part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(3) Then existing mental, emotional, or physical condition. A

*Life Insurance Co. v. Hillmon*²⁶ case and its progeny as the focus of its extended discussion of the state of mind exception to the hearsay rule.

B. Opinions and Expert Testimony

The First District Court of Appeals in *Rieth-Riley Construction Co. v. McCarrell*²⁷ followed Federal Rule of Evidence 704,²⁸ which permits a witness to give an opinion about an ultimate question to be decided by the trier of fact. In so doing, it abrogated the previous rule in Indiana that excluded, per se, such an opinion by

statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed

56 F.R.D. 183, 300 (1972). The adopted federal rule is identical.

²⁶145 U.S. 285 (1892). The Seventh Circuit relied on *Shepard v. United States*, 290 U.S. 96 (1933), to limit the state of mind exception to "[d]eclarations of intention, casting light upon the future" as opposed to "declarations of memory, pointing backwards to the past." 507 F.2d at 352, *quoting from* *Shepard v. United States*, *supra* at 105-06. The *Oberman* court went on to note:

For present purposes, *it is of no moment* whether the facts which gave rise to *Rance's* [the owner of the real estate] *declaration were true or actually occurred*, because the concern here is only with the reason for *Rance's* refusal to lease the Hamlin Avenue property. Thus, there are no problems of memory and perception of the declarant to be tested, and therefore, as in the usual state of mind situation, *Oberman's* recollection of the statement is as likely to be correct as *Rance's* recollection.

507 F.2d at 352 (emphasis added). It is interesting to note that the Seventh Circuit stated that the statements were not offered to prove the truth of the matters asserted therein. Thus, pursuant to the definition of hearsay in Federal Rule of Evidence 801(c), the owner's statements were simply not hearsay at all. *Cf. Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951) (complaining letters from customers, offered to show that cancellation of dealer's franchise was not motivated by dealer's refusal to finance car sales through defendant's affiliate); Proposed Fed. R. Evid. 801(c) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972) (if "the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights" the statement is not hearsay but is a "category of 'verbal acts' and 'verbal parts of an act'"); *McCORMICK* § 249, at 589-90 ("When it is proved that D made a statement to X with the purpose of showing the probable state of mind thereby induced in X, . . . or motive, . . . the evidence is not subject to attack as hearsay") (footnotes omitted).

²⁷325 N.E.2d 844 (Ind. Ct. App. 1975) (first district).

²⁸FED. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

a lay witness.²⁹ In *Rieth-Riley* plaintiff's automobile collided with a pipe which was being dragged along a highway behind defendant's tractor. The plaintiff's attorney was permitted to read a statement made previously by the only eyewitness to the collision in which the witness said: "If I had been driving that automobile and that pipe had popped in front of me like that there would have been nothing I could have done about it."³⁰ The court of appeals first found, in accord with another newly announced rule of evidence in Indiana,³¹ that the prior statement was admissible as substantive evidence. The court also held the statement was admissible despite the fact that it expressed a lay opinion on an ultimate issue in the case—whether or not the accident was unavoidable. Since the witness was the only eyewitness and since he had previously testified both as to his experience as an operator of motor vehicles and to the facts forming the basis of his statement, it was not an abuse of the trial court's discretion to permit the lay witness' inference "based upon his perception of the totality of the circumstances."³²

The focus of the issue when a question solicits an opinion from a witness will now be whether or not the opinion, by a lay person or an expert, is helpful to the trier of fact.³³ Questions calling for

²⁹*E.g.*, *Southern Ind. Power Co. v. Miller*, 185 Ind. 35, 111 N.E. 925 (1916); *New Jersey, I. & I.R.R. v. Tutt*, 168 Ind. 205, 80 N.E. 420 (1907).

³⁰325 N.E.2d at 851.

³¹*See Patterson v. State*, 324 N.E.2d 482 (Ind. 1975).

³²325 N.E.2d at 853.

³³*Id.* at 852. *Cf.* FED. R. EVID. 701 & 702; Proposed Fed. R. Evid. 704 (Advisory Committee Note).

Rule 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) *helpful to a clear understanding of his testimony or the determination of a fact in issue.*

(Emphasis added).

Rule 702 provides:

If scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added).

The Note of the Advisory Committee to Proposed Rule 704 states in part:

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude

legal conclusions will not be permitted, except perhaps when the legal conclusion is also an opinion of general understanding.³⁴

C. Privilege

The new rape shield law³⁵ provides that in prosecutions for sexual offenses evidence of the victim's past sexual conduct may not be admitted except in two circumstances, and then only if it is material to a fact in issue and its inflammatory nature does not outweigh its probative value. The statutory exceptions are:

(a) evidence of the victim's past sexual conduct with the defendant; or

(b) evidence which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded.³⁶

But even in the two limited exceptions, a written motion accompanied by an affidavit containing an offer to prove must be made not less than ten days before trial; if the court finds the offer to prove sufficient, it will order questioning of the victim outside the presence of the jury. Upon a finding that the evidence is admissible, the court will issue an order stating what evidence may be introduced and the nature of the permitted questions.

The impulse of the new statute is an enlightened attempt to make it less likely that a jury will acquit a defendant because of its judgment of the victim's character. It has the collateral benefit of making the victim's appearance on the stand less embarrassing, thus encouraging a victim to testify. However, the statute is constitutionally questionable in at least one respect. If, for example, a defendant contends that the sexual act did not take place or was consented to, and further, offers to prove prior similar instances in which the victim charged other persons falsely of a similar crime, the statute prohibits the evidence *per se*. In these situations the defendant's right of confrontation and cross-examination cannot be subordinated merely to prevent embarrassment to the vic-

opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

56 F.R.D. 183, 195 (1972), *citing* MCCORMICK § 12. *See also* Frase v. Henry, 444 F.2d 1228 (10th Cir. 1971) (wherein the court allowed an opinion on an ultimate issue of fact by applying the "aid to the jury test").

³⁴*See* MCCORMICK § 12, at 29.

³⁵IND. CODE §§ 35-1-32.5-1 to -4 (Burns Supp. 1975).

³⁶*Id.* § 35-1-32.5-2.

tim.³⁷ There may be other instances in which consent is in issue wherein a pattern of conduct by the victim involving other persons might be crucial to the defendant's case. In any event, if the same elaborate pretrial procedures were required before the evidence could be received, these additional exceptions would not be subject to abuse.

Interestingly, while the victim's prior sexual conduct is now shielded, that of the defendant, in many cases, is not. Prior similar acts of the defendant "showing a depraved sexual instinct" are admissible.³⁸ The acts do not have to be with the same person. It should also be noted that the new statute does not mention the common, but discretionary, practice of requiring a pretrial mental examination to determine the credibility of a sex-crime victim. Since the practice has been clearly sanctioned by previous case law,³⁹ presumably the legislators were aware of it and chose not to prohibit it.

D. Original Document Rule

A new statute provides that the recording of hospital medical records by electronic data processing systems is an original written record, and that printouts of retrieved information in written or printed form shall be treated as original records for the purpose of admissibility into evidence.⁴⁰ Pursuant to this statute an objection that a computer printout of a patient's hospital records is not the "best evidence" should not be sustained. In order to authenticate the records, however, the proponent must show:

- (1) the electronic data processing equipment is standard equipment in the hospital;
- (2) the entries were made in the regular course of business at or reasonably near to the happening of the event or order, opinion, or other information recorded;

³⁷See *State v. Nab*, 245 Ore. 454, 421 P.2d 388 (1966); *People v. Scholl*, 225 Cal. App. 2d 588, 37 Cal. Rptr. 475 (1964); *People v. Hurlburt*, 166 Cal. App. 2d 334, 333 P.2d 82 (1958); *McCORMICK* §196, at 466; 3A *WIGMORE* §963 n.2; Annot., 75 A.L.R.2d 508 (1961).

³⁸*Austin v. State*, 319 N.E.2d 130 (Ind. 1974) (Justice Prentice said he would exclude such evidence but felt bound by the earlier decision of *Miller v. State*, 256 Ind. 296, 268 N.E.2d 299 (1971)); *Pieper v. State*, 321 N.E.2d 196 (Ind. 1975) (Justice DeBruler said he would exclude such evidence but felt bound by *Austin*); *Gilman v. State*, 258 Ind. 556, 282 N.E.2d 816 (1972), noted in *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 199 (1973) [hereinafter cited as *1973 Survey of Indiana Law*].

³⁹*Burton v. State*, 232 Ind. 246, 111 N.E.2d 892 (1953). *Burton* has been limited to make it clear that a pretrial mental examination is not required upon defendant's request. *Allen v. State*, 152 Ind. App. 284, 283 N.E.2d 557 (1972), noted in *1973 Survey of Indiana Law* 185.

⁴⁰IND. CODE §§ 34-3-15.5-1 to -4 (Burns Supp. 1975).

- (3) the security of the entries from unauthorized access can be demonstrated through the use of audit trails; and
- (4) records of all original entries and subsequent access to the information are maintained.⁴¹

The person who prepared the original entry need not authenticate it.

The new Federal Rules of Evidence provide that all printouts of data stored in a computer or similar device are "original" documents.⁴² The Indiana courts would be well-advised to follow the federal rule and decisions of other jurisdictions which allow all computer printouts into evidence as original documents.⁴³ A lesser degree of necessity for their use in other areas does not detract from their accuracy, especially if the same foundation showing contained in Indiana Code section 34-3-15.3-3 is required.

E. Demonstrative Evidence

1. Tape Recordings

The Third District Court of Appeals strictly followed the foundation requirements for the admissibility of tape recordings in *Larimer v. State*.⁴⁴ The tape involved was made during a four and one-half hour interrogation of Larimer in the prosecutor's office. In addition to a confession of incest, the recording contained references to Larimer's prior homosexual conduct as well as to his institutional treatment for mental illness. When the State attempted to introduce the entire recording during its case-in-chief, the trial court sustained the defendant's objection that the tape contained prejudicial matters which were immaterial to the confession. Larimer, on the stand in his own behalf, denied both the act of

⁴¹*Id.* § 34-3-15.5-3. Authentication is an additional hurdle once over the original document barrier.

⁴²FED. R. EVID. 1001(3) provides: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" FED. R. EVID. 901(b)(9) provides for authentication as follows: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."

⁴³*E.g.*, *United States v. Russo*, 480 F.2d 1228 (6th Cir. 1973) (upholding admission of computer printouts of an insurance company against a criminal defendant to show that he had filed fraudulent claims with the company); *United States v. De Georgia*, 420 F.2d 889, 895 (9th Cir. 1969) (emphasizing the necessity that a court "be satisfied with all reasonable certainty that both the machine and those who supply its information have performed their functions with utmost accuracy."). *See also* *King v. State ex rel. Murdock Acceptance Corp.*, 222 So. 2d 393 (Miss. 1969); *Transport Indem. Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965).

⁴⁴326 N.E.2d 277 (Ind. Ct. App. 1975) (third district).

incest and the confession. In rebuttal, over defendant's objection, the entire tape was admitted into evidence to impeach Larimer's testimony. The defendant's request for an *in camera* review of the tape to delete prejudicial and immaterial matters not required for impeachment was denied. However, after the entire tape was played in the jury's presence, the court admonished the jury to disregard the statements on the tape pertaining to Larimer's history of homosexuality and mental illness.

The court of appeals, in reversing the conviction of incest and remanding for a new trial, relied on the foundation requirements for the admissibility of tape recordings as set forth in *Lamar v. State*.⁴⁵ One of the five *Lamar* requirements is that the party offering the tape recording show that it "does not contain matter otherwise not admissible into evidence."⁴⁶ The *Larimer* court held that the trial court should have reviewed the tape out of the presence of the jury and taken steps to delete the prejudicial material.⁴⁷

Judge Hoffman, dissenting, thought that the evidence showed the confession was voluntary, and, even if not voluntary, the taped confession was admissible for impeachment purposes.⁴⁸ Furthermore, the trial court had admonished the jury to disregard the prejudicial material, presumably all that was neces-

⁴⁵258 Ind. 504, 282 N.E.2d 795 (1972), noted in 1973 *Survey of Indiana Law* 182. The requisite foundation must show:

- (1) That it is authentic and correct;
- (2) That the testimony elicited was freely and voluntarily made, without any kind of duress;
- (3) That all required warnings were given and all necessary acknowledgments and waivers were knowingly and intelligently given;
- (4) That it does not contain matter otherwise not admissible into evidence; and
- (5) That it is of such clarity as to be intelligible and enlightening to the jury.

Id. at 513, 282 N.E.2d at 800.

⁴⁶326 N.E.2d at 280, quoting from *Lamar v. State*, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972).

⁴⁷326 N.E.2d at 280.

⁴⁸*Id.* at 282 (Hoffman, J., dissenting). Judge Hoffman cited *Oregon v. Hass*, 420 U.S. 714 (1975), and *Harris v. New York*, 401 U.S. 222 (1971), both of which held that confessions obtained without the requisite showing of voluntariness are admissible to impeach a defendant who takes the stand and denies or contradicts the confession. *But see Jackson v. Denno*, 378 U.S. 368 (1964). See also IND. CODE § 35-5-5-1 (Burns 1975):

In any criminal prosecution brought by the state of Indiana, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence and hearing of the jury, determine any issue as to voluntariness.

sary to satisfy the *Lamar* requirements.⁴⁹ Since the majority did not even consider whether or not the error of failure to delete immaterial or prejudicial matters was harmless, the case indicates that this *Lamar* requirement must be strictly adhered to.

In *Jackman v. Montgomery*⁵⁰ the First District Court of Appeals held that a voicewriter recording of a telephone conversation was properly admitted into evidence. At trial the defendant called an insurance adjuster who testified that he had telephoned one of the plaintiff's witnesses (Bailey) and had recorded the conversation. The adjuster obtained Bailey's telephone number from the directory. When Bailey answered, Bailey identified himself. This circumstantial authentication, coupled with the fact that the adjuster personally took the statements contained in the recording and could, therefore, testify to the accuracy of the recording and the exact time and place it was taken, was sufficient to qualify the adjuster to identify the voice as that of Bailey.⁵¹ Judge Robertson, writing for the court, also stated that the requirement in *Lamar* that "'all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given'"⁵² is applicable only to criminal cases.⁵³

2. Scientific Evidence

Failure to follow the strict technical foundation requirements for the admissibility of breathalyzer test results, coupled with the lack of other evidence, caused the reversal of a conviction for reckless homicide and involuntary manslaughter in *Jones v. State*.⁵⁴ "The three requirements for a proper foundation are that the test operator be certified, that the equipment be inspected and approved, and that the techniques used by the operator be

⁴⁹326 N.E.2d at 283 (Hoffman, J., dissenting). See *Martin v. State*, 306 N.E.2d 93 (Ind. 1974).

⁵⁰320 N.E.2d 770 (Ind. Ct. App. 1974) (first district).

⁵¹*Id.* at 774. The *Jackman* court relied on *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972); *Epperson v. Rostatter*, 90 Ind. App. 8, 168 N.E. 126 (1929); and *McCORMICK* § 226, at 554. Federal Rule of Evidence 901 specifically permits authentication by "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called."

⁵²320 N.E.2d at 775, quoting from *Lamar v. State*, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972).

⁵³320 N.E.2d at 775.

⁵⁴315 N.E.2d 403 (Ind. Ct. App. 1974) (third district). The elaborate foundation requirements were outlined in *Klebs v. State*, 305 N.E.2d 781 (Ind. Ct. App. 1974), noted in *1974 Survey of Indiana Law* 191-92.

approved.”⁵⁵ Since the statutory mandate that the device be inspected and approved was not established by the State, the test results were inadmissible.⁵⁶ The Third District Court of Appeals distinguished *Klebs v. State*,⁵⁷ wherein the court found fatal evidentiary absences germane to each of the three foundation requirements, but nevertheless, did not reverse since there was other substantial evidence of the driver’s intoxication.⁵⁸ In *Jones* the only other evidence of defendant’s intoxication was testimony of the smell of intoxicants; this standing alone was insufficient to support a finding of intoxication.⁵⁹

The *Jones* case indicates that, as in the case of tape recordings, the statutory and regulatory foundation requirements must be strictly adhered to.

3. Bodily Invasions

In *Ewing v. State*⁶⁰ the Second District Court of Appeals held that the results of an urinalysis are admissible as “real or physical” evidence. The urine sample was obtained from the defendant after his arrest for possession of narcotics. The court correctly noted that the fifth amendment privilege against self-incrimination applies only to testimonial compulsion.⁶¹ Further, obtaining the sample was not an unreasonable search and seizure, since the process used was apparently free from coercion and the sample was obtained as a result of a routine bodily function.⁶²

⁵⁵1974 *Survey of Indiana Law* 191, citing *Klebs v. State*, 305 N.E.2d 781, 783 (Ind. Ct. App. 1974).

⁵⁶IND. CODE § 9-4-4.5-6 (Burns Supp. 1975). The *Jones* court expressly reserved the question whether or not *certification* of devices per se has become a requirement for an admissible test result. 315 N.E.2d at 404. Certification is not mandated by statute but is required by regulation. IND. AD. RULES & REG. (47-2003h)-2 (Burns Supp. 1975). See 1974 *Survey of Indiana Law* 191 & n.23.

⁵⁷305 N.E.2d 781 (Ind. Ct. App. 1974), noted in 1974 *Survey of Indiana Law* 191.

⁵⁸Other evidence of intoxication in *Klebs* sufficient to make errors in establishing the foundation requirements harmless was eyewitness testimony of Klebs’ erratic driving and consumption of eight to ten drinks in 3½ hours at a restaurant a close distant from the collision. 305 N.E.2d at 782.

⁵⁹315 N.E.2d at 405.

⁶⁰310 N.E.2d 571 (Ind. Ct. App. 1974) (second district).

⁶¹*Id.* at 578, citing *Schmerber v. California*, 384 U.S. 757 (1966); *Hollars v. State*, 259 Ind. 229, 286 N.E.2d 166 (1972). The fifth amendment “does not shield against compulsory submission to tests that are merely physical or produce evidence that is only physical in nature, such as fingerprints, measurements, voice or handwriting exemplars, or physical characteristics or abilities.” *Hollars v. State*, *supra* at 232, 286 N.E.2d at 168. For a discussion of the Indiana and United States Supreme Court decisions concerning bodily searches see 1974 *Survey of Indiana Law* 186-89 & nn.1-11.

⁶²310 N.E.2d at 578.

4. Photographs

A police "mug shot" of a criminal defendant was held admissible under very narrow circumstances in *Saffold v. State*.⁶³ During the routine booking procedure following his arrest for robbery, Saffold was photographed with a sign hung around his neck that included a number, the date the photo was taken, and the words "Police Dept., Hammond Ind." It is the general rule that mug shots are inadmissible when the defendant has not testified or otherwise placed his character in issue because the introduction of such photographs would likely indicate to the jury that the defendant had previously been convicted of a crime. Since direct evidence of prior conviction would be inadmissible, mug shots implying the same are also inadmissible. This rule has been held applicable even when the mug shot is taken after the current arrest.⁶⁴ The court distinguished *Blue v. State*⁶⁵ and *Vaughn v. State*,⁶⁶ which had held mug shots inadmissible.

The *Saffold* court first noted that the introduction of the single photograph was necessary to explain an apparent inconsistency in the testimony of the state's witnesses. Each witness had described a suspect who differed in appearance from the defendant in the courtroom, and the defense probed this identity problem vigorously on cross-examination. The State used the mug shots at the conclusion of its case-in-chief as proof that the defendant had appeared at the time of his arrest as the witnesses described him at the time of trial.

In addition, to avoid any doubt in the jury's mind as to the source of the mug shots, a police detective testified that he photographed Saffold following his arrest. The date on the photograph corroborated this testimony. The *Vaughn* case held that

⁶³317 N.E.2d 814 (Ind. Ct. App. 1974) (third district).

⁶⁴*Blue v. State*, 250 Ind. 249, 235 N.E.2d 471 (1968). *But cf. Vaughn v. State*, 215 Ind. 142, 19 N.E.2d 239 (1939). In *Vaughn* the date was covered but the classic front and profile views were shown together. Thus the jury could still suspect a previous criminal record.

⁶⁵250 Ind. 249, 235 N.E.2d 471 (1968). In *Blue* two witnesses positively identified the defendants as the persons who had robbed them. Therefore the photographs were not necessary. The supreme court in *Blue* made no distinction between current arrest photographs and photographs taken in connection with prior crimes. The court said:

A careful investigation of the cases dealing with the question of the introduction of "mug shots" into evidence shows abundantly clear [sic], that *when* the photos were taken is not material. . . . These photographs [three classic poses] are highly prejudicial upon sight and may very easily create an unfavorable automatic reaction in a juror's mind without further investigation by him.

Id. at 255, 235 N.E.2d at 474 (emphasis in original).

⁶⁶215 Ind. 142, 19 N.E.2d 239 (1939). *See* note 64 *supra*.

prejudicial matter, such as a sign around the defendant's neck, must be removed from the photographs.⁶⁷ In *Saffold*, however, the sign around the defendant's neck could not be removed from the photographs without also removing the distinctive features of the defendant.⁶⁸ The State attempted to minimize the prejudice to the defendant by introducing only one mug shot instead of the two or three of the classic post office pose.

The Third District Court of Appeals stated that the *Blue* and *Vaughn* holdings generally prohibiting the admissibility of mug shots were still intact.⁶⁹ However, there is no doubt that the blanket prohibition in *Blue* against post-arrest photographs as well as photographs taken in connection with prior crimes has been modified. The *Saffold* case clearly establishes that in order for mug shots to be admissible, the State must show a necessity resulting from the substantially changed appearance of the defendant. The photographs must tend to establish the nexus between the prior appearance of the defendant and the witnesses' descriptions at trial. The likelihood of the influence of prior crimes in the jury's mind must be minimized by either covering the prejudicial material or identifying the mug shots as *current arrest* photographs. The prejudice to the defendant can be further minimized if the prosecution does not draw particular attention to the source or implications of the photograph.⁷⁰

The Indiana Supreme Court in *Robertson v. State*⁷¹ held that the introduction of a photograph of the defendant to show that he had changed his appearance since the alleged crime was permissible. It is not clear from the case whether identification or impeachment was the purpose of the introduction. The defendant objected that the photograph depicted him as a "hippie" and, therefore, was prejudicial. If impeachment was the only purpose of the photograph, it should have been excluded as irrelevant. The

⁶⁷215 Ind. at 145, 19 N.E.2d at 241. Dictum in *Vaughn* suggested that there may be a valid use of such photographs to show change in appearance. *Id.*

⁶⁸317 N.E.2d at 818.

⁶⁹*Id.* at 816.

⁷⁰*United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973), cited by the *Saffold* court, 317 N.E.2d at 819, held this additional safeguard was required. The Seventh Circuit held in *United States v. Scott*, 494 F.2d 298 (7th Cir. 1974), that it was *constitutional* error for the government to introduce mug-type photographs into evidence. In this instance, however, the error was harmless because other evidence was overwhelming for guilt. *Id.* at 301, *citing* *United States v. Gimelstob*, 475 F.2d 157 (3d Cir. 1973). In *United States v. Reed*, 376 F.2d 226 (7th Cir. 1967), the Seventh Circuit held that testimony with respect to a mug shot of the defendant violated his fifth amendment privilege against self-incrimination.

⁷¹319 N.E.2d 833 (Ind. 1974).

prosecution should not be encouraged to look for unflattering photographs of defendants to display to the jury. Such use is an indirect method of placing the defendant's character in issue.

5. Chain of Custody

*Hopper v. State*⁷² and *Loza v. State*⁷³ limited the chain of custody foundation requirement of *Graham v. State*⁷⁴ in cases involving nonfungible goods. In *Graham* the Indiana Supreme Court held that an unexplained gap in the exact whereabouts of suspected heroin between the time it was taken from the defendant and the time it was tested in the laboratory rendered inadmissible both the substance itself and testimony about the substance. In *Loza* eight spent .45 caliber shell casings were introduced by the State. Although there was a break in the chain of custody and apparently no testimony specifically identifying the casings as the ones found in the immediate area where the crime had occurred, they were held properly admissible.⁷⁵

In *Hopper*, an appeal from a conviction of forgery, the First District Court of Appeals reached the correct result but applied a rule unduly harsh to the State. The State introduced a check which the defendant attempted to cash at a tavern and the driver's license which he presented as identification to the arresting officer. Prior to the admission of the exhibits, a bartender in the tavern and the arresting officer positively identified the check and driver's license as the items presented to them at the scene of the crime. The court stated that the chain of custody doctrine is not limited solely to fungible evidence.⁷⁶ However, since there was direct testimony identifying the exhibits as the items obtained from the defendant, the court should have applied the rule that establishing a chain of custody is not necessary when a witness

⁷²314 N.E.2d 98 (Ind. Ct. App. 1974) (first district).

⁷³325 N.E.2d 173 (Ind. 1975).

⁷⁴253 Ind. 525, 255 N.E.2d 652 (1970). See 1974 *Survey of Indiana Law* 194 n.32.

⁷⁵The break in the chain occurred when the casings were marked by the duty officer rather than by the officers who found them at the scene. The duty officer also failed to seal the envelope containing the casings before putting them in the property room. 325 N.E.2d at 177. See *Frasier v. State*, 312 N.E.2d 77 (Ind. 1974) (a mere possibility that the evidence could have been tampered with is insufficient to deny admission into evidence).

⁷⁶314 N.E.2d at 104, citing *Bonds v. State*, 303 N.E.2d 686 (Ind. Ct. App. 1973), noted in 1974 *Survey of Indiana Law* 196. Where there is only a mere possibility of tampering, other evidence relating to the whereabouts of the exhibit may be sufficient. The appellant in *Hopper* did not contend that the exhibits might have been tampered with.

with knowledge testifies that "a matter is what it is claimed to be."⁷⁷

Both the *Hopper* and *Loza* courts failed to state clearly that there are two independent ways to establish the foundation for the introduction of nonfungible goods: either establish an unbroken chain of custody or present a witness who can identify the exhibit as the same one connected to the crime. Since memories fail, however, the safest policy for the prosecution and police is to establish a chain of custody for all demonstrative evidence relating to a crime.

In *Mayes v. State*⁷⁸ the Second District Court of Appeals, after discussing extensively the leading chain of custody cases, held that testimony concerning the nature of an exhibit identified as heroin was proper even though the introduction of the substance itself was improper. In *Mayes* a substance was seized from the defendant and accounted for through the time it was tested in the state toxicology laboratory and conclusively determined to be heroin. A break in the chain of custody occurred after testing which rendered the substance itself inadmissible under the holding in *Graham*. The court held, however, that the crucial chain of custody time period for the admission of testing results runs from the time of seizure from the defendant through the time the substance is conclusively tested.⁷⁹ Thus, *Graham* can be distinguished in that the break occurred before the time of testing. The court also noted the elementary proposition that a conviction for narcotics does not depend upon producing the narcotic at trial.⁸⁰

6. Polygraph Tests

In *McDonald v. State*,⁸¹ the First District Court of Appeals squarely decided for the first time in Indiana the question whether the fifth amendment privilege against self-incrimination is violated by the disclosure of polygraph testing in a criminal case. In the course of a bench trial prosecution for statutory rape, the defendant took the stand and denied the act of intercourse. The

⁷⁷FED. R. EVID. 901(b) (1). This same criticism was made last year in a discussion of *Bonds v. State*, 303 N.E.2d 686 (Ind. Ct. App. 1973), a case similar to *Hopper*, and decided by the same court of appeals. See 1974 *Survey of Indiana Law* 196 & n.37.

⁷⁸318 N.E.2d 811 (Ind. Ct. App. 1974) (second district).

⁷⁹*Id.* at 820.

⁸⁰*Id.* at 819-20, citing *Dixon v. State*, 223 Ind. 521, 62 N.E.2d 629 (1945); *Holler v. State*, 219 Ind. 303, 38 N.E.2d 242 (1941). But see *Shropshire v. State*, 258 Ind. 70, 73, 279 N.E.2d 219, 221 (1972), noted in 1973 *Survey of Indiana Law* 180-81; *Keiton v. State*, 250 Ind. 294, 301, 235 N.E.2d 695, 698 (1968).

⁸¹328 N.E.2d 436 (Ind. Ct. App. 1975) (first district).

trial judge asked the defendant if he would be willing to take a lie detector test. The prosecuting attorney volunteered that the prosecutrix already had taken a lie detector test. Defense counsel equivocated about allowing the defendant to take a lie detector test. The trial judge adjourned for the day and told defense counsel to "think it over." The next day defense counsel moved for a mistrial because of the judge's comment about lie detector tests.⁸²

The appellate court held that polygraph examinations are testimonial rather than merely physical evidence.⁸³ Therefore information brought before the court concerning petitioner's refusal to take the test was constitutionally impermissible. The court of appeals relied on *Bowen v. Eyman*,⁸⁴ a federal district court opinion, for the proposition that "[p]roof of silence or invocation of the privilege violates the Fifth Amendment."⁸⁵

In *Bowen*, however, the defendant did not take the stand as in *McDonald*; the evidence of the refusal to take a polygraph examination came from a prosecution witness. Since an accused taking the stand must answer all admissible questions, the real issue, which the *McDonald* court did not discuss, is whether the defendant's refusal to submit to a polygraph test may be used to impeach his testimony if he takes the stand. In an analogous case, *United States v. Hale*,⁸⁶ the Supreme Court of the United States held that a defendant's silence during police interrogation after his arrest could not be delved into on cross-examination of the defendant. The Supreme Court reasoned that

⁸²Judge Pursley stated: "And, I would like to get at the absolute truth and I think a lie detector test, I've found them very successful myself." *Id.* at 438. The judge was concerned with the fact that in most rape cases there are only two witnesses and it is difficult to determine the truth from their statements.

⁸³The court quoted "persuasive dictum" by the Supreme Court of the United States in reaching its conclusion.

Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

328 N.E.2d at 441, quoting from *Schmerber v. California*, 384 U.S. 757, 764 (1966).

⁸⁴324 F. Supp. 339 (D. Ariz. 1970).

⁸⁵328 N.E.2d at 441, quoting from *Bowen v. Eyman*, 324 F. Supp. 339, 341 (D. Ariz. 1970).

⁸⁶422 U.S. 171 (1975).

[n]ot only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.⁸⁷

The Supreme Court found that since the defendant had just been given his *Miranda* warnings, his silence lacked probative value. His failure to speak could "as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony [at trial] was a later fabrication."⁸⁸

In *McDonald*, the refusal to submit to a polygraph examination came at trial while the defendant was on the stand. The speculative inference that he might be relying on his privilege against self-incrimination, as in *Hale*, is wholly lacking. The *McDonald* court found that the defendant's unwillingness to submit to testing "creates a[n] . . . inference that the results . . . might not bear favorably on the credibility of his testimony."⁸⁹ Thus no patent ambiguity is created by the defendant's refusal to submit to a polygraph test in contrast to the situation in *Hale*.

The vast majority of courts in the past have held polygraph examinations to be unreliable, and therefore, their results are inadmissible.⁹⁰ Recent decisions, however, have departed from the view that the results are per se unreliable and have admitted polygraph examination results if there is a stipulation or waiver of objection by the party against whom the results are being offered.⁹¹ Since there was no stipulation or waiver of unreliability

⁸⁷*Id.* at 180. The Court limited the impact of its statement in a footnote which explained:

We recognize that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court. "But where such evidentiary matters have grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control."

Id. at 180 n.7, quoting from *Grunewald v. United States*, 353 U.S. 391, 423-24 (1957).

⁸⁸422 U.S. at 177.

⁸⁹328 N.E.2d at 442.

⁹⁰See generally MCCORMICK § 207. See also 1974 *Survey of Indiana Law* 174 & nn.9 & 10; 1973 *Survey of Indiana Law* 181-82 & n.31.

⁹¹*Reid v. State*, 259 Ind. 166, 285 N.E.2d 279 (1972), noted in 1973 *Survey of Indiana Law* 181-82; *Williams v. State*, 314 N.E.2d 764 (Ind. Ct. App.

by the defendant in *McDonald*, this decision should have rested on that narrower ground. This approach would have avoided a decision on constitutional grounds, and further, would have avoided the illogic of a defendant asserting his privilege against self-incrimination on the stand after voluntarily testifying.⁹²

F. Impeachment

In *Fletcher v. State*,⁹³ the First District Court of Appeals reached a result contrary to the earlier decision in *Lewis v. State*⁹⁴ by another panel of the court of appeals. In *Fletcher*, the court held that even though the defendant was cross-examined concerning his prior conviction for the crime of theft in violation of the landmark case of *Ashton v. Anderson*,⁹⁵ the error was not reversible because the trial was to the court.⁹⁶ The *Lewis* decision would require a bifurcated proceeding with a judge other than the trial judge making the preliminary determination whether or not the conviction sought to be used was one permitted by *Ashton*. If the trial judge became aware of a prior conviction not contemplated by *Ashton* any time prior to judgment, *Lewis* held it was reversible error. The *Fletcher* decision is the better approach because it avoids the necessity of a bifurcated proceeding in bench trials.

In *Mayes v. State*⁹⁷ the Second District Court of Appeals held that cross-examination for impeachment purposes concerning a prior conviction of assault and battery with intent to commit a felony (robbery) was a "crime involving dishonesty" within the meaning of *Ashton*.⁹⁸ Therefore the questioning was proper. In

1974); *Freeman v. Freeman*, 304 N.E.2d 865 (Ind. Ct. App. 1973), noted in 1974 *Survey of Indiana Law* 173-74.

⁹²See, e.g., *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

⁹³323 N.E.2d 261 (Ind. Ct. App. 1975) (first district).

⁹⁴299 N.E.2d 193 (Ind. Ct. App. 1973) (third district), noted in 1974 *Survey of Indiana Law* 203. *Lewis* held that impeachment by prior convictions other than those permitted by *Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210 (1972), was prejudicial error even in a judge-tried case.

⁹⁵258 Ind. 51, 279 N.E.2d 210 (1972), noted in 1973 *Survey of Indiana Law* 178-89. *Ashton* was made applicable to criminal cases in *Dexter v. State*, 260 Ind. 608, 279 N.E.2d 817 (1973), noted in 1974 *Survey of Indiana Law* 203.

⁹⁶The *Fletcher* court cited *King v. State*, 292 N.E.2d 843 (Ind. Ct. App. 1973), noted in 1973 *Survey of Indiana Law* 210, for the proposition "that harm arising from evidentiary error is lessened if not totally annulled when the trial is by the court sitting without a jury." 292 N.E.2d at 846.

⁹⁷318 N.E.2d 811 (Ind. Ct. App. 1974) (second district).

⁹⁸*Id.* at 822. The specific prior crimes admissible to impeach are: treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and willful and corrupt perjury. IND. CODE § 34-1-14-14 (Burns 1973). In addition, according

a vigorous dissent, Judge Buchanan reasoned that the *Ashton* case reflects a desire to limit the admissibility of a witness' prior crimes to those specifically enumerated by statute and those involving dishonesty or false statement.⁹⁹ Judge Buchanan would hold that the words "dishonesty or false statement" are to be narrowly construed so as to include "only those crimes involving such conduct as indicates lack of veracity or propensity to tell the truth;"¹⁰⁰ and, even though the crime of assault and battery with intent to commit robbery is a crime of violence, it does not necessarily indicate a lack of veracity.

Judge Buchanan's reluctance to allow cross-examination concerning the crime involved in *Mayes* appears to be more a product of his fear of prejudice to the defendant by "indiscriminate blackening of a witness' character"¹⁰¹ than of the logical classification of the crime of assault and battery with intent to commit robbery. His reliance on the dictionary definition of "dishonesty" is flawed. The definition "inclination to mislead, lie, cheat, or defraud" must also contemplate the more serious form of dishonesty—robbery.

XI. Insurance

G. Kent Frandsen*

A. Punitive Damages

In *Vernon Fire & Insurance Co. v. Sharp*,¹ the insured sued two insurers who had rejected his proofs of loss. The parties stipulated at trial that (1) the insurers were liable under their

to *Ashton*, convictions for crimes involving dishonesty or false statement are admissible for impeachment purposes. *Ashton v. Anderson*, 258 Ind. 51, 62, 279 N.E.2d 210, 216-17 (1972), citing IND. CODE §§ 34-1-14-13, -14 (Burns 1973); *id.* § 35-1-31-6 (Burns 1975). *Ashton* was applied to the impeachment on cross-examination of a defendant in a criminal case. *Dexter v. State*, 260 Ind. 608, 279 N.E.2d 817 (1973), noted in 1974 *Survey of Indiana Law* 203.

⁹⁹318 N.E.2d 811, 824 (Ind. Ct. App. 1974) (Buchanan, J., dissenting).

¹⁰⁰*Id.* at 825.

¹⁰¹*Id.* at 826.

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The author wishes to thank Kathryn Wunsch for her assistance in the preparation of this article.

¹316 N.E.2d 381 (Ind. Ct. App. 1974). For additional discussion of *Vernon* see Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

policies, (2) the policies were in effect at the time of the loss and covered the property destroyed, and (3) the insured's \$94,000 estimate of loss was acceptable. The insurers contended, though, that since each policy contained a pro rata clause,² their liability should be in proportion to the total amount of insurance in effect at the time of the loss. However, each insurer had assumed a risk of loss by fire to the extent of \$31,250; the total coverage on the destroyed property was therefore \$62,500. In view of the stipulation that the loss exceeded \$94,000, the pro rata clauses were inoperative, and each insurance carrier was liable for its policy limits.

The First District Court of Appeals affirmed a trial court award to the insured of \$34,000 in punitive damages. The court first noted that Indiana law permits recovery of punitive damages where the conduct of the wrongdoer indicates malice or a heedless disregard of the consequences.³ It then found that the insurers' obstinate refusal to settle the claim from the time of loss through trial, more than two years later, constituted a heedless disregard of the rights of the insured. The policy provisions were so clear that the companies could not in good faith dispute the amount of their liability. The jury's award of punitive damages in addition to an award of the policy limits thus was permissible.⁴ *Sharp* is significant in that it appears to be the first

²A pro rata clause, commonly used in the "other insurance" provisions of a policy, provides that when an insured has other insurance available, a company will be liable only for that proportion of loss represented by the ratio between its policy limits and the total limits of all available insurance. *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 76, 269 N.E.2d 97, 99 (1970).

³316 N.E.2d at 384. The court further noted that punitive damages are also permitted where the conduct of the wrongdoer constitutes heedless disregard of the consequences, malice, gross fraud, or oppressive conduct. *Id. See, e.g., True Temper Corp. v. Moore*, 299 N.E.2d 844 (Ind. Ct. App. 1973) (heedless disregard of the consequences); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92 (Ind. Ct. App. 1972) (proof of malice and oppression allows award of punitive damages even where some elements of fraud are unproven). The elements of actionable fraud are stated in *Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁴316 N.E.2d at 384. Subsequent to the decision in *Sharp*, the First District Court of Appeals held in *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975), that an insurer's obdurate refusal to pay death benefits notwithstanding the running of the incontestable period, during which it could have rescinded the policy for the alleged fraud in procuring the policy, would support an award of punitive damages. The court stated:

The record before us reveals evidence that the policy provisions were sufficiently clear that Rex could not dispute the amount of liability in good faith; we are of the further opinion that from such evidence the trial court could reasonably infer the existence of heedless dis-

Indiana case allowing punitive damages in a contract action without a finding of fraudulent conduct by the wrongdoer.⁵

B. Judicial Construction of Policy Provisions

1. Notice "As Soon as Practicable"

*Ohio Casualty Insurance Co. v. Rynearson*⁶ dealt with the construction of a liability policy clause relating to the duty of an insured to give notice to the insurer "as soon as practicable." The insurer's tenant was accidentally electrocuted during the policy period, but the lessor failed to give notice to his liability carrier until he was served 22 months later with a complaint for damages filed by the decedent's personal representative. The insured then made a claim against his insurer, which responded by bringing a declaratory judgment action for a determination of its liability to the insured. The United States District Court for the Southern District of Indiana granted summary judgment for the insurer.

On appeal to the Seventh Circuit Court of Appeals, the insured contended that the design of the policy misled him into the belief that the policy provided no coverage for his tenant's death. The court rejected this contention, primarily on the basis that the insured was a practicing attorney with several years of experience as a claim adjuster, claim supervisor, and claims manager for insurance companies. From these facts the court concluded that the insured possessed a special knowledge of insurance contracts and therefore should be held to a higher standard of care than the average person in complying with the notice provision of his insurance policy.⁶ Furthermore, the insured

regard of the consequences, malice, oppressive conduct and injury. *Id.* at 274.

⁵*Compare* *Physicians Mut. Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973) (punitive damages allowed for fraud), *with* *Standard Land Corp. v. Bogardus*, 289 N.E.2d 803 (Ind. Ct. App. 1972) (punitive damages refused when no fraud proved).

⁶507 F.2d 573 (7th Cir. 1974).

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A notice provision is not to be considered as a technical requirement included in policies merely for the convenience of the insurance company. Rather, it is a matter of substance imposing a valid prerequisite to coverage.

International Harvester Co. v. Continental Cas. Co., 33 Ill. App. 2d 467, 471, 179 N.E.2d 833, 835 (1962), *cited with approval in* *Greater Chicago Auction, Inc. v. Abram*, 25 Ill. App. 3d 667, 323 N.E. 2d 818 (1975).

⁶507 F.2d at 577. *But cf.* *Porter v. General Cas. Co.*, 42 Wis. 2d 740, 168 N.W.2d 101 (1969). The insured consulted his attorney immediately reporting the incident to his liability insurer. A jury was permitted to after an employee was injured on his farm but waited 19 months before find that the notice was given "as soon as practicable."

stated that he had failed to read his policy. Acknowledging that late notice has been excused where the insured was unaware of the existence of a policy,⁹ the court would not apply this exception where the insured alleged that he was unaware of the coverage simply because he had failed to read his policy.¹⁰

Although late notice has been excused upon a showing that the company was not prejudiced by the delay,¹¹ the court noted that a presumption of prejudice arises as a matter of law where a notice is unreasonably late.¹² The presumption arises because "[p]rompt notice of an accident is of great importance in preparing a defense while the facts may be more readily and accurately ascertainable."¹³ Since the insured offered no evidence to rebut this presumption, the trial court was not required to include a finding of prejudice to support its order granting the company's motion for summary judgment.¹⁴

2. *Pre-existing Conditions Clause*

Health and hospitalization policies typically contain a provision excluding coverage for benefits arising from an illness, injury, or physical condition which existed prior to the effective date of the policy. This pre-existing condition provision is included in policies ostensibly for the purpose of protecting insurers from applicants who would otherwise fraudulently seek coverage for a physical condition of which they are already aware.

⁹507 F.2d at 577, *citing* Metropolitan Life Ins. Co. v. Peoples Trust Co., 177 Ind. 578, 584, 98 N.E. 513, 515 (1912).

¹⁰507 F.2d at 577, *citing* General Accident Fire & Life Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965).

¹¹*See, e.g.,* Glade v. General Mut. Ins. Ass'n, 216 Iowa 622, 246 N.W. 794 (1933). For an extensive review of cases excusing compliance with a policy's notice provision see Annot., 39 A.L.R.3d 593 (1971).

¹²507 F.2d at 579, *citing* Hartford Accident & Indem. Co. v. Lochmandy Buick Sales, 302 F.2d 565 (7th Cir. 1962).

¹³507 F.2d at 579.

¹⁴*Id.* The insured also contended that he justifiably believed on the basis of statements in the official coroner's certificate that no claim for damages would result. The court held that this would not justify the delay in notification since the notice requirement related to any occurrence resulting in bodily injury, regardless of the insured's belief as to whether or not a claim would arise. The court was construing the following clause:

In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

507 F.2d at 576.

At issue in *Mutual Hospital Insurance, Inc. v. Klapper*,¹⁵ however, was not the insured's awareness of the condition but the pre-existence of the condition. The Klappers obtained a family health policy with a 270-day waiting period before coverage became effective for a pre-existing condition. One month later a routine eye examination of the insured's child revealed an eye defect for which the child subsequently underwent surgery. The insured submitted a claim for benefits, which the insurer denied on the ground that the disease existed prior to the effective date of the policy and therefore was not covered because of the policy's exclusionary clause.

The insured filed suit and moved for summary judgment. The trial court granted the insured's motion. On appeal, the First District Court of Appeals reversed the summary judgment and remanded to the trial court for a determination of whether the eye defect was capable of diagnosis by a physician prior to the effective date of the policy.¹⁶ The appellate court adopted the majority rule that a disease or condition exists for the purpose of a health insurance policy when it "first becomes manifest or active or when there is a distinct symptom or condition where one learned in medicine can with reasonable accuracy diagnose the disease."¹⁷

On petition to transfer to the Indiana Supreme Court,¹⁸ Justices Givan and Prentice agreed with the first district's interpretation of the test for determining the time of origin of a disease and therefore voted to deny transfer.¹⁹ Justices Arterburn and Prentice, however, voted to allow transfer because of their disagreement with first district's test. They advanced the less restrictive rule that a disease should be deemed to originate when the insured knows or reasonably should have known of the disease rather than when the disease is capable of diagnosis by a physician.²⁰ Since Justice DeBruler did not participate in the supreme court's decision, the court was evenly divided. The court therefore denied transfer in accordance with Appellate Rule 11(B) (5). The test adopted by the first district thus remains the Indiana law regarding the construction of pre-existing conditions clauses.

¹⁵288 N.E.2d 279 (Ind. Ct. App. 1972).

¹⁶*Id.* at 284.

¹⁷288 N.E.2d at 281-82, *quoting from* Southards v. Central Plains Ins. Co., 201 Kan. 499, 502, 441 P.2d 808, 811 (1968).

¹⁸312 N.E.2d 482 (Ind. 1974).

¹⁹*Id.* at 485.

²⁰*Id.* at 484.

The authoritative test for determining the existence of a pre-existing condition is in the alternative: that is, whether (1) the condition has become manifest to the insured, or (2) whether a physician could accurately diagnosis it. The test is open to strong criticism. Obviously, many persons appear to be and believe themselves to be in good health; yet they may have a latent disease which will not manifest itself to them for several years. It would constitute an intolerable trap for purchasers of health and hospitalization insurance if coverage for a pre-existing condition could be denied because a physician, after the policy's effective date, could establish that he could have diagnosed the condition before the effective date had the insured consulted him. Unqualified terms in an insurance policy should not be technically construed; rather, like the words in any contract, they should be read in their common and usual meaning.²¹ Exclusionary clauses, therefore, should not be construed so as to exclude undetected pre-existing conditions.

C. *Stacking of Benefits*

In the 1974 case of *Jeffries v. Stewart*,²² the First District Court of Appeals dealt with a situation in which a single policy of insurance covered several cars. The policy had a limit of liability clause and a separability clause,²³ both of which were applicable to the uninsured motorist coverage (UMC).²⁴ The court found an ambiguity as to whether the limits of liability clause applied to each car or to the insurance contract as a whole and resolved the ambiguity against the insurer, thereby permitting the insured to stack the liability limits of the coverage.²⁵ The

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In construing a contract it is the duty of the court to ascertain the intention of the parties, and to give effect to such intent. In so doing words are to be understood in their plain, ordinary and popular sense, unless there is something in the contract to indicate a different meaning. This rule applies to insurance as well as to other contracts.

Mutual Life Ins. Co. v. Geller, 68 Ind. App. 544, 549, 119 N.E. 173, 174 (1918).

²²309 N.E.2d 448 (Ind. Ct. App. 1974), *discussed in* Frandsen, *Insurance*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 217, 223-24 (1974).

²³A separability clause generally contains language to the following effect: "When two or more automobile are insured hereunder, the terms of this policy shall apply separately to each." R. KEETON, *BASIC TEXT ON INSURANCE LAW* 664 (1971).

²⁴IND. CODE § 27-7-5-1 (Burns 1975) requires all policies insuring against bodily injury or death resulting from automobile accidents to provide coverage when the death or bodily injury is caused by an uninsured motorist. See Frandsen, *supra* note 22, at 219-21.

²⁵309 N.E.2d at 453.

defective draftsmanship of the policy therefore was instrumental in allowing the insured to recover an amount equal to the sum allowable for all cars covered by the policy even though only one car had been damaged.²⁶

Miller v. Hartford Accident & Indemnity Co.,²⁷ decided in 1974 by the United States District Court for the Northern District of Indiana and affirmed by the Seventh Circuit Court of Appeals, demonstrates that proper draftsmanship of policies can prevent stacking of benefits. *Miller* was an action brought by the widow of the insured, suing in her own right and as administratrix of her husband's estate, seeking a recovery of \$60,000 UMC benefits and \$2,000 accidental death benefits. The decedent-insured had purchased one policy covering three vehicles, with limits of liability of \$1,000 for the accidental death of each named insured and \$20,000 for each accident under UMC. The court found that, unlike the policy in *Jeffries*, the *Miller* policy contained no separability clause and the UMC clause unambiguously declared the limits of liability to be applicable to each accident regardless of the number of automobiles covered by the policy.²⁸ The court therefore refused to permit stacking of either the accidental death or the UMC benefits.

In *Miller*, the plaintiff also contended that stacking was permitted under the authority of *Simpson v. State Farm Mutual Auto Insurance Co.*²⁹ *Simpson* concerned an insurer's attempt to limit UMC benefits through the use of an "excess" clause contained in two separate policies issued to the insured, each covering a separate automobile owned by him. Since UMC benefits attach to the named insured as well as to the insured vehicles, the court held that an insurer collecting two separate premiums for the UMC takes the accompanying gamble of having to respond with benefits payable under each policy.³⁰ The court also concluded that UMC reflects a legislative intent to establish at least a minimum recovery for injuries caused by uninsured motorists rather than an intent to fix maximum levels of recovery under this type of insurance. Hence, any attempt to limit the statutorily required coverage through policy limitations would be in derogation of the statute.³¹ The *Miller* court distinguished *Simpson* on the basis that *Miller* involved only one insurance policy and showed

²⁶Frandsen, *supra* note 22, at 224.

²⁷506 F.2d 11 (7th Cir. 1974).

²⁸*Id.* at 15.

²⁹318 F. Supp. 1152 (S.D. Ind. 1970).

³⁰*Id.* at 1156.

³¹*Id.*

no evidence of an attempt to limit liability in derogation of the Indiana UMC statute.³²

Contemporaneous with the decision in *Miller*, the Seventh Circuit Court of Appeals handed down a consolidated decision, *Trinity Universal Insurance Co. v. Capps*,³³ regarding two similar cases concerning attempts by insureds to stack benefits. In the first case, the insurer had issued one policy insuring two separate vehicles. The policy contained a limits of liability clause applicable to both UMC and medical expenses. It also contained a separability clause applicable to the medical expenses coverage but explicitly inapplicable to UMC. Under the authority of *Jeffries* and *Miller*, the court denied stacking of UMC but allowed the insured to stack benefits under the medical services coverage.³⁴ In the companion case, the policy in question contained a clear limitation on the liability of the insurer, and the separability clause was made explicitly inapplicable to the UMC.³⁵ The insured was not permitted to stack the UMC benefits.

On the basis of all these decisions, one may reasonably conclude that stacking of benefits under a policy's UMC and medical expenses coverage will be refused unless specifically permitted by the policy or unless an ambiguity is created in the policy. The ambiguity will be created in two situations: (1) When the separability clause is made applicable to either coverage, or (2) when the limits of liability section of the policy is made inapplicable to one or more of the coverages.

D. Statutory Developments

Among several statutory amendments concerning insurance adopted this year by the Indiana General Assembly, two amendments are of particular significance. In 1974 the General Assembly gave governmental entities authority to purchase liability insurance covering themselves and their employees³⁶ and provided that the attorney general "shall advise the governor concerning the desirability of compromising or settling a claim or suit brought

³²506 F.2d at 14-15.

³³506 F.2d 16 (7th Cir. 1974). The report of the lower court opinion of *Trinity* is found at 387 F. Supp. 106 (N.D. Ind. 1974). The second case was *Schelfo v. Government Employees Ins. Co.*, reported below at 387 F. Supp. 108 (N.D. Ind. 1974). The cases were separately briefed and argued although consolidated for the reported opinion.

³⁴506 F.2d at 18, *aff'g in part and rev'g in part* 387 F. Supp. 106 (N.D. Ind. 1974).

³⁵506 F.2d at 17, *aff'g* 387 F. Supp. 108 (N.D. Ind. 1974).

³⁶IND. CODE § 34-4-16.5-18 (Burns Supp. 1974), *as amended*, *id.* § 34-4-16.5-18 (Burns Supp. 1975).

against the state"³⁷ and shall defend such suits.³⁸ The insurance industry questioned this intrusion of the attorney general into the sacrosanct area of the insurer's contractual privilege to compromise and settle claims made against its insureds.³⁹ The 1975 legislature, in an attempt to resolve this conflict, amended the 1974 statute to subordinate the historic duties of the attorney general⁴⁰ to the contract rights of the insurer.

The pertinent section of the amendment provides that the terms of the policy govern the rights and obligations of both the governmental entity and the insurer with respect to the settlement and the defense of claims or suits brought against the insured, but that the insurer may not enter into a settlement for an amount exceeding the insurance coverage without the approval of the insured's chief executive or governing board.⁴¹ The restriction on the insurer's authority to settle for an amount in excess of policy limits is nothing more than an illusory concession, since any attempt to bind an insured to an amount in excess of policy limits without the insured's approval has no effect.⁴²

The 1975 General Assembly also amended the existing statutes concerning life, accident, and health insurance by adding a

³⁷*Id.* § 34-4-16.5-14(a) (Burns Supp. 1974), *as amended*, *id.* § 34-4-16.5-14(a) (Burns Supp. 1975).

³⁸*Id.* § 34-4-16.5-14(d) (Burns Supp. 1974), *as amended*, *id.* § 34-4-16.5-14(d) (Burns Supp. 1975).

³⁹A standard liability insurance policy typically contains a provision such as the following:

The insured agrees that the company shall defend any suit alleging such bodily injury and property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

⁴⁰IND. CODE § 4-6-2-1 (Burns 1973) (originally enacted as Act of March 5, 1889, ch. 71, § 4, [1889] Ind. Acts 125).

⁴¹IND. CODE § 34-4-16.5-18 (Burns Supp. 1975), *amending id.* § 34-4-16.5-18 (Burns Supp. 1974).

In a letter to the Governor dated April 16, 1975, the attorney general stated that it was his opinion that the amendment was unconstitutional since it delegated a portion of the executive and administrative power of governmental entities to privately owned insurance companies.

⁴²*See Birkholz v. Cheese Makers Mut. Cas. Co.*, 274 Wis. 190, 192, 79 N.W.2d 665, 666 (1956), wherein the court noted:

Insurance policies, and particularly the one in the instant case, habitually state that the insurer's functions are limited to the terms and conditions of the policy. The authority of the insurer to make settlements is limited to the insurer's own resources and it is not empowered by the policy, without the insured's knowledge and consent, to contribute toward the settlement either cash or other property, such as causes of actions, belonging to the assured.

new chapter expanding coverage for the insured's family.⁴³ The new chapter mandates that insurance benefits be payable to a newly-born child from the moment of birth for the care and treatment of congenital defects and birth abnormalities.⁴⁴ Unfortunately, the amendment applies only to those policies delivered after October 1, 1975.⁴⁵ The original bill had provided that its requirements also would apply to all accident and sickness insurance policies in effect at the date of passage of the act.⁴⁶ However, on second reading in the senate, the bill's sponsor successfully moved to amend the original version by deleting any reference to these policies.⁴⁷

The amendment also contains an emergency clause making the statute's provisions effective on passage.⁴⁸ Thus, the question of whether or not coverage exists under a policy issued after April 21, 1975, the date on which the Governor signed the bill, and before October 2, 1975, the expressed date of application of the statute, may be the subject of litigation. It is highly irregular to include conflicting effective dates in a bill, although one may conclude that the emergency clause merely served as notice to the insurers to prepare for the issuance after October 1, 1975, of policies containing the expanded coverage.⁴⁹ The preferable legislative action would have been to impose the required coverage on all policies delivered, issued for delivery, or renewed after the effective date.

⁴³IND CODE §§ 27-8-5.6-1 *et seq.* (Burns Supp. 1975).

⁴⁴*Id.* § 27-8-5.6-2.

⁴⁵Ind. Pub. L. No. 282, § 2 (Apr. 21, 1975) provides, "The requirements of this act shall apply to accident and sickness insurance policies and contracts delivered or issued for delivery in this state after October 1, 1975."

⁴⁶Ind. S. 169, 99th Gen. Assembly, 1st Sess. (1975) provided in part: The requirements of this act shall apply to all accident and sickness insurance policies delivered or issued for delivery in this state after October 1, 1975. All accident and sickness insurance policies in effect on the passage of this act shall be amended to provide the newly born coverage required by this act not later than September 30, 1975.

⁴⁷Presumably, the sponsor was apprised of the doubtful validity of a provision which would alter retroactively the contractual obligations of the parties. See [1944] OPS. ATTY GEN. IND. No. 32, at 132, in which it was stated that "statutes and ordinances should be given a construction which will not give them a retroactive effect, especially where such a construction will either destroy or impair vested property or contractual rights." See also *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N.E. 586 (1887).

⁴⁸Ind. Pub. L. No. 282, § 3 (Apr. 21, 1975).

⁴⁹The purpose of a future effective date is to inform persons of the provisions of a statute before it becomes effective in order that they may take steps to protect their rights and discharge their obligations. Cf. *McLead v. Commercial Nat'l Bank*, 206 Ark. 1086, 178 S.W.2d 496 (1944).

XII. Products Liability

*John F. Vargo**

Products liability generally involves the liability of a seller of products to parties who, as a rule, are not in privity with the seller.¹ Over the years product liability cases have been litigated on many theories: principally those of negligence,² inherently dangerous items,³ warranty,⁴ and strict liability in tort.⁵ The "old strict liability" theory relating to inherently dangerous items was restricted to a small class of products considered imminently dangerous to human safety.⁶ Early in the development of products liability litigation, plaintiffs also began to recognize that negligence was an ineffective theory of recovery because of certain problems: identification of the defect,⁷ defendants' assertions of contributory negligence,⁸ and proof of negligence.⁹ The later developed sales warranty theory of recovery also contained various roadblocks to a plaintiff's recovery, for example, notice requirements,¹⁰ disclaimers,¹¹ privity,¹² and proof of a warranty's exist-

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The author wishes to express his appreciation to Richard Dick for his assistance in the preparation of this discussion.

¹W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1971) [hereinafter cited as PROSSER].

²2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.5, at 1042 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER § 96, at 642.

³Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1112 (1960).

⁴2 HARPER & JAMES §§ 28.15, 28.23; PROSSER § 97.

⁵2 HARPER & JAMES §§ 28.26, 28.27; PROSSER § 98.

⁶PROSSER § 96, at 642.

⁷Smith v. Michigan Beverage Co., 495 F.2d 754 (7th Cir. 1974); Prosser, *supra* note 3, at 1114.

⁸PROSSER § 65.

⁹*Id.* § 103.

¹⁰UNIFORM COMMERCIAL CODE § 2-607(3).

¹¹UNIFORM COMMERCIAL CODE § 2-316.

¹²Privity is divided into "horizontal" and "vertical" privity. Vertical privity is the nexus between the seller and buyer. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-2, at 327-28 (1972). Horizontal privity is the nexus between the buyer and other parties. See UNIFORM COMMERCIAL CODE § 2-318. For a discussion of these privity concepts see Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code, A Survey*, 29 BUS. LAW. 925 (1974). Privity as a bar to recovery seems to have a continuing vitality in Indiana warranty law. Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 882 (S.D. Ind.

ence.¹³ Because of the difficulties with these early theories of recovery, there has been an increased movement toward the theory of strict liability in tort as set forth in section 402A of the *Restatement (Second) of Torts*¹⁴ when a plaintiff sues for injuries arising from a defective product.¹⁵

Section 402A is premised in part upon the special responsibility of sellers of products toward the consuming public.¹⁶ Also, strict tort liability transfers the financial burden of injuries resulting from defective products from the user to the manufacturer because the manufacturer is more able to protect against losses resulting from injury caused by the product. The manufacturer may protect itself by passing the cost on to consumers via an increased price for the goods—a “spreading the loss” approach—or by the manufacturer’s purchase of general liability insurance.¹⁷ Although section 402A has moved to the forefront of recovery theories in products liability litigation, the cases make

1970) (horizontal and vertical privity required if warranty sounds in contract).

¹³*See, e.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

¹⁴RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A]. This section states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

¹⁵The plaintiff must show the following to recover under section 402A:

1) The user was injured by a product. *See Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

2) The product was in a defection condition and/or unreasonably unsafe. *See Jakabowski v. Minnesota Mining & Mfg.*, 42 N.J. 177, 199 A.2d 826 (1964); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14-15 (1965).

3) The product was defective at the time it left the seller’s hands. PROSSER § 103, at 671.

¹⁶*Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

¹⁷§ 402A, Comment c. A wholesaler or retailer also can obtain insurance; but in most cases, either the injured consumer will go directly against the manufacturer or the wholesaler or retailer (or their insurer) will go back against the manufacturer if they have to pay the injured consumer.

it clear that the other theories of recovery still provide viable alternatives under certain circumstances.

A. *Privity*

In *Karczewski v. Ford Motor Co.*,¹⁸ the plaintiff purchased from another individual a used Ford Mustang which had been driven about 16,000 miles prior to the purchase. Shortly after the plaintiff purchased the car and at a time when the odometer indicated that the car had been driven 18,000 miles, the car accelerated out of control while the plaintiff was attempting to negotiate a left turn. The plaintiff sued Ford for injuries allegedly resulting from the malfunction of a defective carburetor spring that caused the uncontrollable acceleration of the car. The plaintiff based his action upon three theories—negligence, implied contract warranty, and strict tort liability.

Ford's expert testified at trial that Ford did not perform any testing or inspection of the carburetor spring and that the spring had a useful life of about four to six years or for about 60,000 to 70,000 thousand miles. Thus, it appeared that the spring malfunctioned long before it could reasonably have been expected to do so. The jury returned a verdict for the plaintiff, and the court gave judgment in accordance with this verdict after finding that the evidence was sufficient to sustain all of the plaintiff's theories of recovery, though it was necessary to find only one theory sustainable by the evidence in order for the plaintiff to recover.

The United States District Court for the Northern District of Indiana, citing *MacPherson v. Buick Motor Co.*,¹⁹ found that Ford's failure to inspect and test the carburetor spring sustained a claim of negligence. Also, strict tort liability under section 402A was found on the ground that the jury could conclude from the evidence that the defective condition of the spring caused the plaintiff's collision and the resultant injury. Regarding the implied warranty claim, the court stated that the particular purpose of a passenger automobile is for safe transportation on the public highways and that automobiles are impliedly warranted for such purposes.²⁰

Interestingly, the Seventh Circuit Court of Appeals had discussed a similar issue in an earlier case, though this case was

¹⁸382 F. Supp. 1346 (N.D. Ind. 1974).

¹⁹217 N.Y. 382, 111 N.E. 1050 (1916).

²⁰Judge Sharp's view of the particular purpose of automobiles seems to conflict with the apparent concept of intended use found in *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966). See note 23 *infra*.

not discussed by the *Karczewski* court. In *Evans v. General Motors Corp.*,²¹ evidence was presented that the injuries suffered by occupants of an automobile involved in a collision would have been less severe had the auto been designed differently. This evidence raised the question whether the manufacturer could be held liable for these enhanced injuries resulting from the faulty design. After concluding that the defendant was not required to consider foreseeable highway collisions in the design of its autos, the court stated:

The intended purpose of an automobile does not include participation in collisions with other objects despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant urges, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons.²²

Surely no one would seriously argue that an auto must be equipped with pontoons. Likewise, surely even auto manufacturers would not argue that autos are not intended to provide safe transportation.²³ There appears to be no overriding reason why manufacturers should not be required to consider the high incidence of auto accidents when designing automobiles. Parenthetically, it appears that the *Evans* court was more concerned about the liability of auto manufacturers than the safety of those traveling in the auto.

In *Karczewski*, Ford had asserted that the plaintiff was barred from recovery because the implied warranty of fitness for a particular purpose²⁴ contained a privity requirement, which the plaintiff could not satisfy since he was a remote purchaser. The court, citing *Filler v. Rayex Corp.*²⁵ as controlling, held that Indiana does not require privity to support an implied warranty claim. This holding is subject to at least two interpretations. First, that the long standing privity requirement in contract warranty actions as codified in section 2-318 of the Uniform Commercial

²¹359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

²²*Id.* at 825.

²³Intended use as applied in *Evans* seems to consider the use of the product from the viewpoint of the manufacturer. This position on intended use has been much criticized for ignoring certain foreseeable dangers arising out of the intended use of the product. PROSSER § 96, at 646. *See also* *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); Sklaw, "Second Collision" Liability: The Need for Uniformity, 4 SETON HALL L. REV. 499, 522 (1973); Note, *Torts-Duty to Design a "Crashworthy" Vehicle—Dreisonstok v. Volkswagenwerk A.G., A Third Approach?*, 27 OKLA. L. REV. 557 (1974).

²⁴IND. CODE § 26-1-2-315 (Burns 1974).

²⁵435 F.2d 336 (7th Cir. 1970).

Code has been eliminated;²⁶ or secondly, that the court was merely following the established practice of distinguishing actions based upon implied warranties sounding in contract from actions based upon implied warranties sounding in tort. Indiana law appears to support such a distinction.²⁷ Implied warranties which sound in contract appear to retain all of the restrictions on asserting warranties under the UCC, such as notice, disclaimers, and privity; implied warranties which sound in tort appear to be synonymous with liability imposed by section 402A, which does not require privity.²⁸ Though the *Karczewski* court failed to make this distinction clear, the reliance upon *Filler* appears to indicate that privity is still a viable requirement in warranty actions which sound in contract, since the plaintiff in *Filler* was in privity with the defendant seller.²⁹

B. Defect and Stream of Commerce

In *Link v. Sun Oil Co.*,³⁰ the plaintiff alleged that the defendant's employees repaired a tire for the plaintiff by inserting a new inner tube. The plaintiff and two other men transported the repaired tire back to the disabled truck from which the tire had been removed. While attempting to mount the tire, the plaintiff struck the wheel rim with a 6-pound sledge hammer and the tire exploded, injuring the plaintiff. Evidence later disclosed that the explosion was caused by a bent rim on the wheel assembly. On the basis of this evidence, the plaintiff asserted that the rim was bent when it left the defendant's service station after the repair by the defendant's employees. Plaintiff further alleged that the tire was in a defective condition because of the failure on the part of the defendant's employees to warn him that the rim was bent and that it might have a dangerous propensity to explode because of this condition. The defendant replied that his employees neither repaired the tire nor sold the inner tube to the plaintiff. In addition, the defendant's expert testified that a blow from a 6-pound sledge hammer could bend the wheel rim and cause the tire to explode.

²⁶See pp. 270-71 *supra*.

²⁷See *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965); *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878 (S.D. Ind. 1970); *Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280 (Ind. Ct. App. 1975).

²⁸See *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965).

²⁹In *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878 (S.D. Ind. 1970), the court examined the *Filler* case and concluded that the issue of implied warranties sounding either in tort or contract was not raised in *Filler* though the plaintiff, in the court's opinion, was in privity with the defendant-seller.

³⁰312 N.E.2d 126 (Ind. Ct. App. 1974).

The trial court entered judgment for the defendant upon a jury verdict in his favor, and the plaintiff appealed based upon two asserted errors. First, the plaintiff alleged that the trial court erred in refusing to give a tendered instruction regarding "defect" from a failure to warn.³¹ The appellate court found no error because this issue was sufficiently covered in another instruction given by the court. However, the appellate court accepted the proposition offered by the plaintiff's omitted instruction that a failure by the manufacturer to warn can render a product defective.³²

Secondly, the plaintiff alleged error based upon the sufficiency of evidence, asserting that his testimony that the defendant's employees sold him an inner tube and repaired his tire outweighed the testimony of the defendant's employees to the contrary. After initially determining that it was not necessary for the plaintiff to show a sale, since injecting a product into the "stream of commerce" was sufficient to invoke section 402A liability, the court held that the plaintiff failed to prove that the defendant had "placed the product into commerce."³³ The stream of commerce approach was derived from the earlier Indiana case of *Perfection Paint & Color Co. v. Konduris*.³⁴ Thus, it is now clear that a "commercial sale"³⁵ is not a requisite element for maintaining a section 402A action in Indiana.

C. Circumstantial Evidence

In *Smith v. Michigan Beverage Co.*,³⁶ the plaintiff purchased a 28-ounce nonreturnable bottle of root beer from a local store. She then went home and placed the bottle near a gas pipe on the floor of the kitchen between a refrigerator and a wall. When she later reached down to lift the bottle, it exploded and injured her. The plaintiff sued the manufacturer, alleging, in the alternative, that the manufacturer was negligent in failing to inspect the bottle and in failing to maintain the proper quality control to ensure the safety of the product. The plaintiff's case appeared to be damaged by testimony from experts that the glass bottle was not in a defective condition at the time that it left the hands of the manufacturer. However, the jury, disregarding this evidence, rendered

³¹*Id.* at 128-29.

³²*Id.* at 129. *Cf.* *Reyes v. Wyeth Labs*, 498 F.2d 1264 (5th Cir. 1974); *Keeton, Products Liability*, 50 F.R.D. 338 (1971).

³³312 N.E.2d at 130.

³⁴147 Ind. App. 106, 259 N.E.2d 681 (1970).

³⁵A "commercial sale" requires the passing of title for a price from the seller to the buyer. IND. CODE § 26-1-2-106 (Burns 1974).

³⁶495 F.2d 754 (7th Cir. 1974).

a verdict for the plaintiff; the United States District Court for the Southern District of Indiana granted judgment in accordance with the verdict.

In reversing the trial court, the Seventh Circuit Court of Appeals examined the sufficiency of the evidence and concluded that there was a total failure to prove any defect in the bottle. The plaintiff had asserted that because the bottle broke she was entitled to a presumption of a defect. Nevertheless, the court held that the presumption did not arise because the bottle was in the exclusive control³⁷ of the plaintiff at the time of accident and because the plaintiff had an opportunity to examine the bottle after the accident to determine the cause of the explosion. In addition, although it appeared that the plaintiff had attempted to show that the bottle contained a design defect, the court found that the plaintiff failed to present evidence to establish such a defect.

Although the court's conclusion may be justifiable, the opinion raises questions regarding the reasons for reversing a jury verdict. First, the court found that the plaintiff produced no evidence to support the allegation of a defective condition which would allow the jury to find that the defendant was negligent. However, the court failed to clearly set forth the facts presented at trial upon this issue. Thus, it is difficult to determine whether the jury, as the trier of fact, could have derived any inferences from the evidence presented that would support the allegation of a defect.³⁸

Secondly, the court refused to permit the plaintiff to use the doctrine of *res ipsa loquitur*. The court stated that, as in negligence cases, the mere fact of injury cannot create an inference of negligence, so in accident cases, the mere fact that an accident occurred cannot create a presumption that a product was defective.³⁹ Though these propositions are well established, the court

³⁷The *Smith* court relied extensively on the case of *Evansville Am. Legion Home Ass'n v. White*, 239 Ind. 138, 154 N.E.2d 109 (1958). The plaintiff in *White* was injured when she sat on the defendant's chair and the chair collapsed. Justice Arterburn, writing for the majority, stated that *res ipsa loquitur* did not apply since the chair was not in the exclusive control of the defendant *at the time of the accident* but broke at the time it was in the plaintiff's control.

³⁸The court admitted in a footnote that evidence was presented at trial which indicated that nonreturnable bottles were thinner than other bottles. 495 F.2d at 758 n.8. In addition, the court stated that evidence was presented concerning the amount and purpose of the testing performed on the bottles by the manufacturer, though the court did not state what constituted such evidence. Also, the plaintiff's expert gave an opinion that the bottle causing injury contained a "philosophical defect" since it broke during normal use, which in his opinion meant the bottle was unsafe for use in the household.

³⁹The *Smith* court's discussion of presumptions rather than inferences

beclouded the *res ipsa loquitur* issue. The court stated that the policy underlying *res ipsa loquitur* rests to a large extent upon the fact that the injuring agency is within the special knowledge and control of the defendant and that the plaintiff has no access to such information. This analysis is inaccurate.⁴⁰ Courts some time ago shifted the emphasis under *res ipsa loquitur* away from the knowledge and control requirements.⁴¹ Now the doctrine is invoked by the extraordinary happening, that is, whether the

indicates that the court apparently misapprehended the plaintiff's use of circumstantial evidence to support an inference of certain conduct on the part of defendant. This raises the question whether the court refused to permit inferences to be drawn from circumstantial evidence. It is clear that presumptions and inferences are distinguishable concepts. In the case of an inference, the existence of *B* may be deduced from the existence of *A* through the use of ordinary reasoning and logic. However, in the case of a presumption, the existence of *B* must initially be assumed as a matter of law once *A* is shown. J. WEINSTEIN & M. BARGER, *WEINSTEIN'S EVIDENCE* ¶ 300[02] (1975). Thus, if an exploding bottle is considered an extraordinary event, it would be justifiable for a reasoning person to infer that there was a defect in the bottle. The plaintiff in *Smith* was entitled to such an inference. See Rheingold, *Proof of Defect in Products Liability Cases*, 38 TENN. L. REV. 325, 338 (1971) [hereinafter cited as Rheingold].

⁴⁰See Rheingold at 337.

⁴¹Three conditions are usually necessary before *res ipsa loquitur* will be applied:

- (1) The accident must be one that ordinarily would not occur in the absence of negligence, or, as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use;
- (2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part.

2 HARPER & JAMES § 19.5, at 1081 (citations omitted). The first element must be present before the doctrine and the subsequent inference of the defendant's negligence will arise. The second element, control, is not usually literally applied since this places too great a burden upon the plaintiff. Where this requirement is literally applied, Professor Prosser states that it has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury as in the . . . case denying recovery where a customer in a store sat down on a chair, which collapsed." PROSSER § 39, at 220. The defendant's control at the time of the indicated negligence should be sufficient to satisfy this requirement. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944); *Baker v. Coca Cola Bottling Works*, 132 Ind. App. 390, 395, 177 N.E.2d 759, 762 (1961); PROSSER § 39, at 220. The final requirement is that the plaintiff eliminate the possibility that he may have been contributorily negligent. This requirement is similar to the second requirement. Clearly, the plaintiff's participation in the occurrence or his exclusive control of the instrumentality at the time of injury should not preclude application of *res ipsa loquitur*, so long as the plaintiff's conduct does not impair the inference that the defendant was the one who was negligent. 2 HARPER & JAMES § 19.8, at 1093. Some courts apply a fourth require-

accident ordinarily would have occurred in the absence of negligence. Thus it is more accurate to resort to *res ipsa* in an accident case based upon the following:

Under some circumstances, the failure of a product to perform in the way the consumer would have expected it to is evidence of the existence of a defect. Or, to put it another way, a happening out of the ordinary with a product raises an inference of its defectiveness in many instances.⁴²

Rejecting the doctrine of *res ipsa loquitur* upon the fact, viewed in isolation, that the plaintiff was in control of the injuring instrumentality at the time of the accident, is contrary to more logical present day authority found in many jurisdictions.⁴³

D. Contributory Negligence

In *Gregory v. White Trucking & Equipment Co.*,⁴⁴ the plaintiff purchased a cab-tractor unit from the defendant for use in his business. Part of the purchase arrangement included the defendant's agreement to install a "fifth wheel" unit on the cab. The installation was completed, but the plaintiff found it necessary to make several trips to the defendant's shop to correct problems with the fifth wheel assembly. Shortly after the last repair, the plaintiff was involved in an accident. The fifth wheel allegedly failed to function properly, causing the plaintiff to run off the road and resulting in damage to the cab-trailer and to the cargo being transported. The plaintiff brought an action based upon negligence and the breach of an implied warranty of fitness for a particular purpose.⁴⁵ The trial court granted the defendant a judgment on the evidence⁴⁶ on the negligence count, and the jury

ment that the evidence be more accessible to the defendant than to the plaintiff, but this should not be an indispensable requirement for the application of *res ipsa loquitur*. PROSSER § 39, at 225.

⁴²Rheingold at 337-38.

⁴³In *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944), the court stated:

Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

(Emphasis in original).

⁴⁴323 N.E.2d 280 (Ind. Ct. App. 1975).

⁴⁵IND. CODE § 26-1-2-315 (Burns 1974).

⁴⁶IND. R. TR. P. 50.

returned a verdict in favor of the defendant on the warranty count. Thus, the plaintiff was denied recovery under either theory.

On appeal, the Second District Court of Appeals found that since the evidence presented by the plaintiff satisfied the test for determining a motion for judgment on the evidence—was there some evidence of negligence⁴⁷—the trial court erred in granting judgment on the negligence count. The court also reversed the judgment on the warranty action because the trial court erroneously gave instructions regarding contributory negligence. This holding was based upon a determination that contributory negligence was not a defense to either the “traditional” warranties or the “new” warranties. The “traditional” warranties alluded to are the general contract warranties in the UCC; the “new” warranties are essentially principles of liability in tort similar to the strict liability principles found in section 402A. Thus, contributory negligence is not a defense to a warranty action sounding either in contract or tort. Relying on historic and current authority, the court noted, however, that the accepted defenses to warranty actions based on section 402A include assumption of risk,⁴⁸

⁴⁷Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971).

⁴⁸In the past Indiana courts have limited the use of the term “assumption of risk” to cases where there is a contractual relationship between the parties, and have invented the term “incurred risk” for use in all other cases. Coleman v. Demoss, 144 Ind. App. 408, 246 N.E.2d 483, 488 (1969). Since the contract element is the only distinguishable element found in these two defenses, the discussion which follows will use the term assumption of risk even in situations where no contractual relationship exists.

Assumption of risk is recognized as a defense to both negligence and strict tort liability actions. § 402A, Comment n; PROSSER § 68. In negligence cases the Indiana courts have repeatedly cautioned against equating assumed risk with contributory negligence. See, e.g., Gregory v. White Truck & Equip. Co., 323 N.E.2d 280, 288 n.6 (Ind. Ct. App. 1975); Christmas v. Christmas, 305 N.E.2d 893 (Ind. Ct. App. 1974). However, they have not heeded their own warnings. State v. Collier, 331 N.E.2d 787 (Ind. Ct. App. 1975); Sullivan v. Baylor, 325 N.E.2d 475 (Ind. Ct. App. 1975). But see Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943) (guest-passenger case). For example, in *Christmas*, the First District Court of Appeals meshed the two defenses by defining assumption of risk as follows:

The doctrine of incurred risk is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or could be readily discernible by a reasonable and prudent man under like or similar circumstances.

305 N.E.2d at 895 (emphasis added). Thus, the *Christmas* court used objective reasonable man language to define assumption of risk. This is generally the test for establishing contributory negligence, but it is not the test most jurisdictions use for establishing assumption of risk. To prove assumption of risk, the defendant generally must show a voluntary undertaking, knowledge of the risk, and an understanding of the risk by the plaintiff. These elements usually are tested by a subjective standard. PROSSER § 68. Therefore, assump-

misuse,⁴⁹ and lack of causation.⁵⁰

tion of risk requires a showing of a voluntary undertaking which can only be tested by a subjective standard.

The application of the *Christmas* definition in negligence cases would not unfairly prejudice the plaintiff since both contributory negligence and assumption of risk are defenses to a negligence action. It is inappropriate, however, to apply this definition in strict tort liability cases, as was done, for example, by the Third District Court of Appeals in *Coronette v. Seargeant Metal Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970). The prejudice created by the application of this definition in strict tort liability cases arises from the fact that this definition bars the plaintiff from recovery for conduct constituting contributory negligence, which is not a defense to strict tort liability.

If the Indiana courts are going to continue to insist that contributory negligence and assumption of risk be treated separately, the *Christmas* definition quoted above must be modified to the extent that it uses the objective reasonable man standard. If the *Christmas* definition is retained, it should be applied only in negligence cases. It would then be necessary to devise a separate assumption of risk defense for strict tort liability cases. This separate assumption of risk defense, of course, would have to contain a subjective test to determine whether the plaintiff voluntarily undertook the risk of injury.

These language problems could easily be resolved if incurred risk was discarded as a separate defense and was replaced by an assumption of risk defense containing the elements of voluntary undertaking, knowledge, and understanding of the risk of injury—all subjectively tested. This assumption of risk defense would be applicable to both negligence and strict tort liability actions, as is the case in most jurisdictions. PROSSER § 68.

⁴⁹Although the court stated that misuse, lack of causation, and assumption of risk are valid bars to strict tort liability actions, the misuse defense may be mere surplusage. In *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965), the court indicated that misuse refutes either a defective condition or the causation element. Thus, misuse that creates the defect causing the injury would bar liability because the product was not defective at the time it left the seller's hands. However, misuse that creates a defect which does not cause injury may not bar liability for an injury which is caused by a condition in the product at the time it left the seller's hands. It appears, therefore, that the conduct of the user, denominated misuse, may be examined exclusively by a causation approach, since the misuse either causes the injury or the injuring defect. If misuse thus can be equated to causation, misuse should be discarded as a separate defense. See *Perfection Paint & Color Co., v. Konduris*, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970).

⁵⁰A pattern jury instruction defines proximate cause in the following manner:

That cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury complained of and without which the result would not have occurred.

INDIANA PATTERN JURY INSTRUCTIONS § 5.81, at 55 (1966). This instruction appears to require more than legal cause, which contemplates only a "substantial factor" as the test for causation. RESTATEMENT (SECOND) OF TORTS § 431 (1965). Indiana courts have used the term proximate cause in discussing section 402A cases. *Sills v. Massey Ferguson, Inc.*, 296 F. Supp. 776, 779 (N.D. Ind. 1969); *Coronette v. Seargeant Metal Products, Inc.*, 147 Ind. App. 46, 55-61, 258 N.E.2d 652, 657-61 (1970). Cf. *Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280, 287 (Ind. Ct. App. 1975).

XIII. Professional Responsibility

*Charles D. Kelso**

A. Community Standards and Code Standards:

Is the Boat Starting to Rock?

What wisdom is available to lawyers who believe that a custom of local practice conflicts with the Indiana Code of Professional Responsibility?¹ In some counties, "Don't rock the boat" may be the conventional answer. A quiet boat may carry along questionable but convenient habits that do not give rise to complaints by clients, adverse publicity, or uneasy feelings among practitioners.

Although some time-honored local customs are now obviously improper,² there may yet be a stillness over troubled waters concerning questions to which the Code does not provide clear an-

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¹The Indiana Code of Professional Responsibility [hereinafter referred to as the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA Code]. The House of Delegates of the American Bar Association adopted the ABA Code on August 12, 1969, to become effective on January 1, 1970. The ABA Code was amended on February 24, 1970. Indiana adopted this version of the ABA Code in 1971.

The Code contains Ethical Considerations and Disciplinary Rules, which are defined as follows:

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being the subject to disciplinary action.

INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

²For example, with respect to dividing fees without regard to the proportion of services and the responsibility assumed, the Code in Disciplinary Rule 2-107(A) provides that:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

swers. The unrocked boat leaves lawyers drifting uneasily toward their personal solutions. For example does an advocate ever have a duty to permit perjury by the defendant?³ This question surely has arisen in Indiana practice hundreds of times; yet, the record remains barren of discussion, let alone answers. Another example of a common ethical problem left unresolved at the community level is how does a lawyer interview responsibly without suggesting useful but untrue answers?⁴ Also, if cross-examination would destroy the testimony of an adverse but truthful witness, must the lawyer go forward with that cross-examination?⁵

By adopting the Code of Professional Responsibility in 1970 and enervating the Disciplinary Commission in 1971,⁶ the Indiana Supreme Court decided that the ethics boat should be rocked in Indiana.⁷ The commission now provides a ready ear for complaints

³The Code in Disciplinary Rule 7-102(A) (4) provides that a lawyer must not "[k]nowingly use perjured testimony or false evidence." However, the Code contains no practical guidance for resolving the resulting dilemma. To properly prepare, the attorney must hear all relevant facts known to the accused, using assurances of confidentiality if necessary. A problem which then arises is whether the client must be warned against an admission of guilt or incriminating information that might later impair the client's constitutional right to zealous representation by a competent lawyer. Dean Monroe H. Freedman concludes that the attorney in a criminal case has the duty to "examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 40-41 (1975). In a civil case, Dean Freedman suggests, the attorney is required to divulge the client's perjury only when the attorney has participated in the perjury. Some lawyers, perhaps evasively, resolve the problem by saying that the lawyer never really "knows" that the client is guilty or lying, for those matters are entrusted to the jury.

⁴The Code provides that a lawyer shall not "[p]articipate in the creation" of evidence when the lawyer "knows or it is obvious that the evidence is false." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A) (6). However, the Code does not suggest how the attorney can test the thoroughness of a client's recall by explaining the legal relevance and importance of various aspects of a situation without incurring the risk that it may tend to induce the client, in some circumstances, to commit perjury.

⁵Dean Freedman suggests that the lawyer must press forward and that the viable alternatives are law reform or declining to accept cases where one's personal views are so strong that they might interfere with effective advocacy. FREEDMAN, *supra* note 3, at 49. See also INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-101(A); *id.* Ethical Consideration 5-1, 5-2.

⁶IND. R. ADMISS. & DISCP. 23(6) (composition of the commission).

⁷The supreme court has the exclusive jurisdiction to admit attorneys to the practice of law. IND. CODE § 33-2-3-1 (Burns 1975). This authority carries with it the right to suspend or disbar attorneys as the court may, in its judicial discretion, find reasonable under the circumstances. *In re Harrison*, 231 Ind. 665, 109 N.E.2d 722 (1953).

about lawyers' shortcomings or misconduct, whether the complaints are filed by clients or by lawyers. Disciplinary Rule 1-103 (A) imposes a duty on lawyers to report unprivileged knowledge of a Code violation. The supreme court's decision to increase the annual registration fee for practicing attorneys from \$15 to \$35⁹ should enhance the commission's capacity to investigate. The court's decision to publicly reprimand a lawyer for misconduct⁹ indicates its willingness to increase the flexibility of sanctions. All these developments should result in thorough and responsible investigations into the Code's application to local customs and special circumstances.

The supreme court, by circulating or otherwise providing for the dissemination of information on proposed Code changes, could obtain any feedback necessary to improve the Code. The use of a mechanism through which the court can receive carefully considered and publicly discussed recommendations for Code amendments remains an important step to be taken. The court could effectuate such a mechanism by requesting that a study of Code amendments be undertaken by the Disciplinary Commission, the Indiana State Bar Association, or an advisory committee.¹⁰ A committee might find it easier than the court to gather data and viewpoints, to hold hearings, and to publish tentative proposals regarding amendments to the Code. These procedures would facilitate the incorporation of diverse perspectives based on a wide range of experiences. A committee could consider whether the Indiana Bar should have disciplinary rules or other objectives that differ from those of the American Bar Association. There is a precedent for this from another jurisdiction.¹¹ Hopefully, the court will make such an assignment in the near future or will create a new committee expressly charged with this responsibility.

⁹IND. R. ADMISS. & DISCP. 23(21)(a) (effective October 1, 1975). A discussion of the change is set forth in 19 RES GESTAE 284 (1975).

⁹*In re Ackerman*, 330 N.E.2d 322 (Ind. 1975).

¹⁰An existing committee has the potential to undertake this task. Trial Rule 80 created an Advisory Committee on Revision of Rules of Procedure and Practice, which has authority to study proposed rule changes and make recommendations to the supreme court. This rule is applicable to the Admission and Discipline Rules. As a result, it would appear that Rule 80 also applies to the Code of Professional Responsibility which is incorporated into the Admission and Discipline Rules through Admission and Discipline Rule 23(2). In the past, the committee's expertise has concerned procedural matters almost exclusively. Thus, it is questionable whether this committee's responsibility should be extended to encompass the Code. For a discussion of Trial Rule 80 see 19 RES GESTAE 276, 285 (1975).

¹¹The District of Columbia Court of Appeals amended Disciplinary Rule 7-102(B)(1) as follows:

A lawyer who receives information clearly establishing that:

Changes already approved by the American Bar Association

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refused or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

DISTRICT OF COLUMBIA COURT OF APPEALS CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B) (1) (amended April 1972) (underlined phrase deleted by the amendment). For the wording of the ABA rule see note 14 *infra*.

This amendment had previously been adopted in 1970 by the Bar Association of the District of Columbia, pursuant to a 74 percent affirmative vote of those responding on a mail ballot. FREEDMAN, *supra* note 3, at 257. That such a procedure can contribute to useful discussion of professional responsibility problems seems clear from considering the well drafted arguments which were set forth on the ballot for and against the amendment. The argument for the amendment was:

The effect of the Code provision can be illustrated by a divorce case. At the husband's deposition, he produces his tax return and testifies that it is complete and accurate. Through confidential communications from his client, the husband's attorney learns that the husband has additional unreported income. The attorney urges him to correct his false testimony, and he refused to do so. The proposed DR subjects the attorney to discipline if he does not reveal the unreported income to the wife and her attorney, to the court, and to the IRS. Thus the DR would turn the lawyer into his client's judge and prosecutor instead of his advocate, and make clients fearful of confiding relevant information fully and freely to their attorneys. It would require an abridgement of the long-established confidentiality of the lawyer-client relationship. There is sufficient protection against the lawyer being made a participant in the client's fraud in the permissible withdrawal provisions of DR 2-110(C).

FREEDMAN, *supra* note 3, at 258. The argument against the amendment was:

The lawyer is first and foremost an officer of the court and as such participates in a search for truth. The false tax return and testimony in the illustration are perjurious and are a fraud on the client's wife, the court, and the IRS. A lawyer who knows that his client is committing perjury and fails to reveal it is betraying the law itself, to which he owes his highest allegiance. A confidential communication from a client does not privilege the client to bind the lawyer to become a partner and participant in a fraudulent and illegal course of conduct. By definition, information concerning the perpetration of a fraud "in the course of the representation" is unprivileged and not entitled to confidence. Nor is it sufficient simply to permit the lawyer to withdraw from the case and remain silent. The proposed DR is necessary to put the bar and the public on notice that the lawyer's devotion to integrity precludes participation in a client's "dirty work."

Id.

In addition, the National Council of the Federal Bar Association adopted supplemental Ethical Considerations on November 17, 1973. These amendments deal with the problem that arises when a lawyer employed by the government receives incriminating information from a fellow employee. They create a duty to reveal the information to supervisors and a duty to warn that such information is not privileged and will be disclosed.

probably should be adopted by the Indiana Supreme Court.¹² The supreme court has responded to the ABA's concern about making group legal service plans available by proposing Admission and Discipline Rule 26.¹³ This rule defines requirements for such plans, calls for annual reporting, and requires lawyers to comply with the Code. Also, it seems quite likely that Indiana lawyers would support the 1974 ABA amendment to Disciplinary Rule 7-102(B). The amended rule now requires that lawyers reveal a fraud perpetrated by their clients only when the information regarding the fraud is not a privileged communication.¹⁴

A variety of additional clarifications or changes in the present Code might well be considered. For example, although the Code requires honesty by condemning a lawyer's knowingly false statement of law or fact in representing a client,¹⁵ it does not contain clear guidelines on whether an advocate may be disciplined for breaking his or her own word to another lawyer. The conventional wisdom on this matter for neophytes says that "only a few lawyers in this county don't keep their word." The young lawyer is

¹²ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-33 (added February 1975) (encouraging attorneys to cooperate with qualified legal assistance organizations providing prepaid legal services); *id.* Disciplinary Rules 2-101(B), 2-103(B), (C), (D), 2-104(A) (amended February 1975) (creating standards for legal assistance organizations and especially approving open-panel plans); *id.* Disciplinary Rule 5-105(A), (B) (amended March 1974) (declining employment if it would be likely to involve the lawyer in representing different interests); *id.* Disciplinary Rule 5-105(D) (amended March 1974) (extending employment disqualification to partners, associates, and affiliates); *id.* Ethical Consideration 7-34, Disciplinary Rule 7-110(A) (amended March 1974) (allowing campaign fund contributions to candidates for judicial office pursuant to B(2) under Canon 7 of the Code of Judicial Conduct); *id.* Disciplinary Rule 8-103(A) (added March 1974) (requiring lawyer candidates for judicial office to comply with applicable provisions of Canon 7 of the Code of Judicial Conduct); *id.* Definition (7) (amended February 1975) (bar association); *id.* Definition (8) (added February 1975) (qualified legal assistance organization). See FREEDMAN, *supra* note 3, at 249.

¹³See 19 RES GESTAE 284 (1975).

¹⁴

A Lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to affected person or tribunal, except when the information is protected as a privileged communication.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B) (1) (amended March 1974) (amendment underlined).

¹⁵INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A) (5).

advised that he or she will learn "in practice" who cannot be trusted. Apparently the legal profession does not regard the conduct of those dishonest few, even where beset with broken promises and unreliable assurances, as in violation of the Code. At least, this kind of violation is not regarded as one for which the boat should be rocked.

A pervasive problem is how a lawyer should respond when a client wants the lawyer's aid in doing something which is legal, but which is unjust in the lawyer's opinion. In such a circumstance, the Code allows the attorney to withdraw in nonlitigation matters.¹⁶ But the Code does not provide explicit guidelines indicating whether the attorney may assist the client without violating the spirit of the Code. Explicit guidelines would protect the attorney in two ways: (1) The attorney would know when he could assist the client without being disciplined, and (2) the attorney, in explaining his position to the client, would be backed up by the Code. Thus, consideration should be given as to whether the Code should provide explicit guidelines regarding this issue, as it does regarding requests by clients that lawyers express their personal views on the merits of litigation.¹⁷

B. Recent Indiana Decisions on Attorney Discipline

1. Flexibility of Sanctions

During the spring of 1975, the Indiana Supreme Court created waves by ordering the public reprimand of an Indianapolis lawyer.¹⁸ The lawyer had accepted \$140 from a client toward a \$200 fee. However, he had failed to act upon the client's request

¹⁶"In the event that the client in a non-adjudicated matter insists upon a course of conduct that is contrary to the judgment and advise of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." *Id.* Ethical Consideration 7-8.

¹⁷*Id.* Disciplinary Rule 7-106(C) states:

In appearing in his professional capacity before a tribunal, a lawyer shall not:

-
- (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
 - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

¹⁸*In re Ackerman*, 330 N.E.2d 322 (Ind. 1975). Sanctions are likely to become more flexible as of January 1, 1976, under proposed Admission and Discipline Rule 23(3)(c), which adds probation to the current list of disbarment, suspension, and public or private reprimand. See 19 RES GESTAE 277 (1975).

that a bankruptcy petition be filed, even when it appeared that the client's wages were about to be garnished. The court majority, composed of Justices Prentice, Givan, and DeBruler, thought that the client was morally entitled to the return of his money; yet they declined to order restitution. Instead, they recommended that the client file a civil action for restitution. Justice Arterburn dissented in an opinion with which Justice Hunter concurred. The dissenting justices supported the hearing officer's recommendation that restitution be ordered by the court.¹⁹

Despite the unwillingness of the majority to order restitution in this case, it appears that a much wider range of sanctions is now available. The reprimand by the court indicates that it will order discipline commensurate with the nature of the misconduct rather than applying only the sanctions of disbarment or suspension. This development may cause the Disciplinary Commission to expand the number of cases it carries forward to hearings. In addition, this case may help remove some of the inhibitions attorneys feel about triggering commission inquiry into local practices which violate the Code.

Of course, some attorneys deserve severe sanctions. By supervising discipline, the supreme court protects the public against both incompetent and unscrupulous professionals. For example, the court disbarred an attorney who violated the trust of his client (the Federal Government) by forging transportation requests.²⁰ The hearing officer had recommended a 4-year suspension, stressing that the attorney had been severely disadvantaged as a youth. The court unanimously replied that the attorney was not only well employed but that he was under no extraordinary stresses at the time of the misconduct. In arriving at its decision, the court applied three factors to determine whether the sanction for misconduct should be disbarment or only suspension. These factors were: (1) The attorney's guilt, (2) the risk to the public if the attorney's practice continues, and (3) the particular circumstances bearing on the likelihood of future transgressions.²¹ The court also disbarred an attorney who borrowed \$4,625 from an estate he was representing, telling the administrator that this was proper, and who later gave the administrator a bad check for \$4,100 as repayment.²²

¹⁹330 N.E.2d at 324 (Arterburn, J., dissenting).

²⁰*In re Lee*, 317 N.E.2d 444 (Ind. 1974).

²¹*Id.*

²²*In re Broadfield*, 315 N.E.2d 357 (Ind. 1974). *Cf. In re Wyttenbach*, 324 N.E.2d 481 (Ind. 1975) (attorney disbarred who had been convicted of theft).

2. Inadequate Representation

A lawyer's professional misconduct may have consequences for the client or the lawyer irrespective of whether the lawyer is disciplined. One frequently litigated example of nondisciplinary consequences to the client involves defendants who were inadequately represented in a criminal proceeding. These defendants may be entitled to a reversal. While counsel is presumed competent, this presumption may be overcome by a strong and convincing showing that the attorney's actions made a mockery of the trial which shocks the conscience of the court.²³ The fact that the attorney could have conducted the defense differently is not sufficient to require a reversal.²⁴ Nor do isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience necessarily imply that counsel is ineffective, unless, taken as a whole, the trial is a mockery of justice.²⁵

Four recent attempts by defendants to overcome the presumption of competent representation came to naught. A defendant, convicted of second degree murder, contended in *Brown v. State*²⁶ that his attorney had coerced him to plead guilty to a crime which he did not commit. However, the court of appeals did not find that the guilty plea had been entered involuntarily. As a result, the defendant failed to overcome the presumption of counsel's competence.

In *Greer v. State*²⁷ defendant sought relief from a conviction for robbery and infliction of injuries on the ground of insufficiency of the evidence. This issue had been waived on appeal by the defendant's attorney. The defendant was, in essence, claiming that the attorney's failure to pursue this issue amounted to incompetent representation as a matter of law. The supreme court held that the appellate attorney did not make a mockery of the appeal by waiving this issue as a matter of strategy. The reviewing court will not second guess counsel's tactics or strategy.

A defendant was convicted of second degree murder in *Robertson v. State*.²⁸ He appealed, alleging that counsel's inadequacy was shown by the following three things: (1) Failure to object to the cross-examination of the defendant which elicited information regarding a previous theft conviction, (2) failure to object to admission of pictures and testimony which demonstrated that defendant had long hair and a moustache at the time of the inci-

²³Greer v. State, 321 N.E.2d 842 (Ind. 1975).

²⁴Blackburn v. State, 260 Ind. 5, 22, 291 N.E.2d 686, 696 (1973).

²⁵*Id.*

²⁶322 N.E.2d 98 (Ind. Ct. App. 1975).

²⁷321 N.E.2d 842 (Ind. 1975).

²⁸319 N.E.2d 833 (Ind. 1974).

dent but not at the time of the trial, and (3) the failure to poll the jury as allowed by statute. The court's holding on each of these issues was adverse to the defendant. Because there was a question regarding the defendant's character, the evidence of the prior theft was not improper. Nor was the use of the pictures improper, because evidence of the defendant's changed appearance was relevant. Finally, the failure to poll the jury was not in itself proof of incompetence without further proof of harm to the defendant.

In *Maxwell v. State*²⁹ the defendant sought to have a homicide conviction vacated. The defendant alleged at the post-conviction hearing that his counsel had been incompetent at the trial. This allegation was based on the counsel's failure to present evidence favorable to a plea of self-defense and a defense of insanity. The attorney had not called any witnesses on behalf of the defendant despite the fact that defendant was under guardianship at the time of the homicide, that he had twice before been in mental institutions, and that three persons could have testified that he was not the aggressor. Counsel testified at the post-conviction hearing that he had advised a plea bargain rather than call witnesses at the trial because the state had incriminating evidence and he did not believe that the defendant was insane. After defendant's motion to vacate his conviction was denied by the criminal court, he appealed to the supreme court. The supreme court stated that in a post-conviction proceeding, the trial judge, as the trier of fact, is the sole judge of the weight and credibility of the witnesses. By hearing the attorney, the trial court could best determine whether the attorney's testimony defeated the defendant's claim. Therefore, the supreme court affirmed the lower court's decision in favor of the attorney.

In civil, as well as in criminal cases, inadequate representation may have important consequences. The lawyer may be liable to the client for damages caused by the lawyer's negligence or misconduct. For example, any persons owed adequate representation under an insurance policy may recover for damages caused by inadequate representation. Thus, in *Simpson v. Motorists Mutual Insurance Co.*,³⁰ the insurance company was ordered to pay the full \$210,000 judgment, even though the policy limit was \$10,000, where the company had rejected an offer to settle for the policy limit without consulting the protected party.

²⁹319 N.E.2d 121 (Ind. 1974).

³⁰494 F.2d 850 (7th Cir. 1974). See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 316 N.E.2d 381 (Ind. Ct. App. 1974).

3. Authorization for Attorney's Actions

While the attorney rather than the client controls the litigation process, the attorney may not totally disregard the desires of the client. In *Bramblett v. Lee*³¹ the defendant sought relief from a stipulation of paternity. The defendant's attorney had forgotten to note the trial date on his calendar, and he was not prepared to litigate the matter. As a result, he called the judge to inform him of the situation. During the conversation, the attorney entered a stipulation of paternity, leaving the support issue to be settled later. Subsequently, after support had been set, the defendant had a new attorney file a motion to correct errors on the basis that the prior attorney was not authorized to enter the stipulation. The First District Court of Appeals stated that by reason of employment, the attorney was impliedly authorized to enter a binding stipulation. However, the court also added that if the stipulation was contrary to the directions of the defendant, the defendant must look elsewhere for redress, namely to the attorney.

In *Hendrixon v. State*³² the defendant's attorney failed to raise a particular issue in a motion to correct errors because he felt it was frivolous. The client had continuously expressed his desire to present this particular issue to the court. The Third District Court of Appeals held that the defendant was entitled to file a belated supplemental motion to correct errors. In this case, the court leaned toward the client in resolving the tension between a client's right to decide on legally available methods³³ and the lawyer's duty not to assert a frivolous position.³⁴ A general principle regarding authorization appears to be that a client is always bound by authorized acts of his attorney but that he may not be bound by unauthorized acts, depending on the circumstances of the case.

C. Discipline of Judges

The Indiana Code of Judicial Conduct, by order of the Indiana Supreme Court, became effective on January 1, 1975. It replaces the Indiana Code of Judicial Conduct and Ethics which had been adopted by the Indiana Supreme Court in 1971. The Code of Judicial Conduct includes provisions relating to judicial, quasi-judicial and extra-judicial activity, political constraints, and income reporting.³⁵ A section following the Canons describes the extent

³¹320 N.E.2d 778 (Ind. Ct. App. 1974).

³²316 N.E.2d 451 (Ind. Ct. App. 1974).

³³See INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-8.

³⁴See *id.* Ethical Consideration 7-4; Disciplinary Rule 7-102(A).

³⁵Indiana also has a statute which requires that judges make financial reports. IND. CODE § 33-2.1-8-3 (Burns Supp. 1975).

to which part-time, pro tempore, and retired judges must comply.

A commission on judicial qualifications of judges has been created pursuant to article 7, section 9 of the Indiana Constitution.³⁶ This commission is composed of seven members.³⁷ Three members are attorneys elected by other members of the bar. Three members are laymen appointed by the Governor. The remaining member, who serves as chairman, is the Chief Justice of the Indiana Supreme Court or another justice appointed by the Chief Justice. This commission has jurisdiction to hold disciplinary hearings regarding the alleged misconduct of judges of superior, probate, juvenile, and criminal courts³⁸ and to make recommendations to the supreme court. Any citizen of Indiana may file with the commission a complaint regarding a judge,³⁹ and the commission can make inquiry on its own motion.⁴⁰

Two recent cases have dealt with the power of the supreme court to discipline judges. In a 1974 case, *In re Evrard*,⁴¹ a prosecuting attorney sought to have a judge removed for alleged violations of criminal laws. The supreme court stated that disciplinary powers over judges include suspension, with or without pay, retirement and removal, and all the other disciplinary sanctions available against lawyers.⁴² The supreme court appointed a new hearing officer to conduct further inquiry into the case.

In a 1975 case, *In re Terry*,⁴³ the Disciplinary Commission initiated a proceeding against a circuit court judge as a judicial officer and as a member of the bar. It was alleged that the judge violated the Code of Judicial Conduct and Ethics, the Code of Professional Responsibility, the Oath of Attorneys, and the Judicial Oath of the Ripley County Circuit Court.⁴⁴

³⁶*Id.* §§ 33-2.1-6-1 to -30 (Burns 1975).

³⁷*Id.* §§ 33-2.1-4-1, -4-2, -4-8.

³⁸*Id.* § 33-2.1-6-3. Under a proposed rule, the commission would investigate complaints against all justices and judges of the state. Proposed Ind. R. Admiss. & Discpl. 25. For the text of the proposed rule see 19 RES GESTAE 276 (1975).

³⁹IND. CODE § 33-2.1-6-8 (Burns 1975).

⁴⁰*Id.* § 33-2.1-6-9.

⁴¹317 N.E.2d 841 (Ind. 1974).

⁴²Under a proposed amendment to the disciplinary rules, judges would be included within the definition of the term "attorney" and would thus be subject to the same sanctions. Proposed Ind. R. Admiss. & Discpl. 23(1). It is also proposed that discipline for attorneys include probation, permanent disbarment subject to reinstatement, suspension for a definite or indefinite period subject to reinstatement, suspension not to exceed six month with automatic reinstatement, public reprimand, or private reprimand. Proposed Ind. R. Admiss. & Discpl. 23(3). For a complete text of the proposed rules see 19 RES GESTAE 276, 277 (1975).

⁴³323 N.E.2d 192 (Ind. 1975).

⁴⁴*Id.* at 193.

Based on the findings of a hearing officer, the supreme court suspended the judge without pay. On appeal, a majority of the supreme court affirmed its previous action.⁴⁵ The judge raised three issues on his appeal to the supreme court. The first issue was whether the supreme court had jurisdiction to discipline the judge except as provided by article 7, section 13 of the Indiana Constitution.⁴⁶ The majority held that the court had jurisdiction. Secondly, respondent claimed that the Disciplinary Commission was without authority to bring an action against a circuit court judge. The supreme court held that the commission did have such authority. Finally, the judge maintained that the evidence was insufficient to support the findings of the hearing officer.

In reviewing the evidence, the supreme court only considered the alleged violations of the Code of Judicial Conduct and Ethics. At issue were alleged violations of Rules 1, 2, 3, 8, and 10. Rule 1 calls for the avoidance of impropriety. The majority found this rule violated by numerous actions of the judge. Most of these actions involved his illegal removal of a welfare board member. Rule 2 provides that a judge is to organize the court with a view to prompt and convenient dispatch of its business. The majority found that the judge had deliberately organized the court to delay the business of attorneys who had signed the disciplinary grievance against him. The majority noted that far-reaching consequences to a client resulted from the judge's actions. Rule 3 requires courtesy to counsel, and Rule 8 forbids intervention in the conduct of the trial. The majority found that the judge violated these rules by his undue and unnecessary questioning of various counsel during trial. Lastly, the majority found that the judge violated Rule 10 by allowing his own personal idiosyncrasies to guide the administration of justice.

Justices DeBruler and Prentice, in separate opinions, concurred in part and dissented in part.⁴⁷ Justice DeBruler agreed with the majority that the supreme court has jurisdiction and that the Disciplinary Commission has authority to bring such an action. However, he disagreed regarding the sufficiency of the evidence. Justice DeBruler felt that Rules 1, 3, and 10 were too vague for a judge to know what behavior was expected. Furthermore, he felt that the evidence did not allow the inference that the judge was either

⁴⁵The majority opinion was written by Justice Hunter and concurred in by Justices Givan and Arterburn.

⁴⁶This section provides that the supreme court may remove any circuit court judge who has been convicted of corruption or other high crime. The court stated that the basis for discipline was actually under article 7, section 4 of the Indiana Constitution which gives the supreme court original jurisdiction regarding discipline of judges.

⁴⁷323 N.E.2d at 202.

neglectful or incompetent or that he had disrupted the orderly process of the court. Thus, Justice DeBruler would have entered judgment for the respondent.

Justice Prentice differed from the majority in his preference for a trial de novo rather than a mere review of the findings of the hearing officer. While Justice Prentice did find that the judge was not temperamentally suited to the office and that the judge did commit acts of indiscretion which disrupted the judicial process, he did not find the evidence convincing to the extent the majority did. Justice Prentice would have ordered a less severe sanction, such as reprimand or brief suspension, rather than suspension until further notice.

D. Academic Developments

One may turn from the courts to academia for additional developments which portend changes in practice. In 1973, the American Bar Association revised its standards for the approval of law schools to require that every student take a course in professional responsibility.⁴⁸ This instruction must include the ABA Code and the history and traditions of the profession. Although many schools have long had required courses in professional responsibility, one effect of the ABA requirement may be to bring more scholars into this field.

One sociological study⁴⁹ points to the nature of a law practice as a factor making it difficult and sometimes impossible to conform to ethical standards. In efforts to obtain business, and in dealing with clients or public officials, the attorney is often exposed to pressures to engage in practices contrary to official norms. The most important ongoing research on this problem is that being undertaken by a team at the University of Michigan Law School under the direction of Dr. Andrew Watson.⁵⁰ The team is attempting to discover the nature of the psychological pressures generated in attorneys by ethical conflicts arising out of practice and to discover ways to teach attorneys to cope with these pressures. The results of the Watson research could have far-reaching implications for teaching professional responsibility to law students as well as providing assistance to practicing attorneys.

⁴⁸ABA APPROVAL OF LAW SCHOOLS STANDARDS AND RULES OF PROCEDURE 302(a) (iii), at 7 (1973).

⁴⁹J. CARLIN, *LAWYERS ON THEIR OWN* 209 (1962).

⁵⁰Pepe, *Is There a Doctor in the House? Opening Reflections on The Involvement of Psychiatrists in Michigan's Legal Clinic*, VII COUNCIL ON LEGAL EDUCATIONAL FOR PROFESSIONAL RESPONSIBILITY, INC. No. 12, December 1974. For this research, students are videotaped while interviewing and counseling clients. Two psychiatrists assist with the evaluation of inner tensions and emotional reactions which are stirred up in the lawyers as well as in the client.

The most important scholarly publication of 1975 in the area of professional responsibility is *Lawyers' Ethics in an Adversary System* by Dean Monroe H. Freedman.⁵¹ Dean Freedman analyzes a number of ethical problems, making vigorous arguments on behalf of the adversary system as the fairest and most efficient way of determining the truth. Further, he inveighs against the present Code restrictions on advertising, which he views as an interference with the duty of the profession to make legal counsel available, particularly to persons who may otherwise be ignorant of their rights.

The most important impact of this book will be to point the way for analysis of professional responsibility in terms of the functions of institutions and roles assigned to persons in those institutions. Freedman disagrees with the traditional approach to professional responsibility. He feels that the traditional approach has two characteristics: (1) It is committed in general terms to all that is good and true, and (2) it answers specific questions by uncritically relying on legalistic norms, regardless of the context in which the attorney acts or of the motives and consequences of the act.⁵² In contrast, Freedman views ethics as part of a functional sociopolitical system concerned with the administration of justice in a free society.⁵³ Thus, his system attempts to deal with ethical problems in context, giving due regard to both the motives of the individual lawyer and the consequences of the lawyer's actions to society as a whole.

XIV. Property*

The Indiana courts decided two significant property cases during this survey period. In *Barnes v. Macbrowne & Co.*,¹ the First District Court of Appeals refused to extend to subsequent vendees the implied warranty of habitability for purchasers of residential dwellings from the builder-vendor. This case is discussed in the section on contracts and commercial law.²

In *In re Estate of Fanning*,³ the Third District Court of Appeals dealt with the ownership of certificates of deposit made out

⁵¹FREEDMAN, note 3 *supra*.

⁵²*Id.* at 45.

⁵³*Id.* at 46.

*Bruce A. Hewetson

¹323 N.E.2d 671 (Ind. Ct. App. 1975).

²See pp. 141-42 *supra*.

³315 N.E.2d 718 (Ind. Ct. App. 1974). In a recent decision the Indiana Supreme Court unanimously affirmed the holding of the Third District Court

by the purchaser in the name of multiple parties. Wildus Fanning purchased two certificates of deposit—one for \$10,000, the other for \$5,000—both made out to her or her daughter Marcella Seavey “either of them with the right of survivorship and not as tenants in common.” The mother kept the certificates in her safety deposit box; the daughter did not know of their existence until they were found after her mother’s death, at which time she obtained possession of the certificates, received interest on them, cashed them, and retained the principal and interest. The mother had died intestate, and her estate sued the daughter for possession of the certificates.⁴

The trial court applied the so-called gift theory, adopted by the Third District Court of Appeals less than two years previously in *Zehr v. Daykin*.⁵ The trial court apparently found that there had been no delivery to the daughter prior to the donor’s death.⁶ Since delivery is one of the elements necessary to establish a valid *inter vivos* gift,⁷ the court awarded possession of the certificates to the estate.

Court of Appeals and adopted Judge Staton’s majority opinion. *In re Estate of Fanning*, 333 N.E.2d 80 (Ind. 1975).

⁴The opinion does not say how the daughter obtained possession of the certificates. Probably, the bank where the mother’s safety deposit box was located delivered the certificates to the daughter. A banking institution can pay any one of the joint parties and the receipt of the funds by the joint party releases the bank from any liability. IND. CODE § 28-1-20-1 (Burns 1973). The opinion is not clear, but the daughter possibly had obtained interest on and cashed the certificates before the estate sued her. If this was the situation, the estate was attacking the daughter’s retention of the proceeds. If the courts had ultimately found for the estate, it probably could have attached the proceeds of the certificates on a constructive trust or equitable lien theory if it could trace them into the daughter’s hands.

⁵288 N.E.2d 175 (Ind. Ct. App. 1972). In *Zehr* the decedent purchased certificates of deposit and had orally requested the bank to make them payable to himself and his son as joint tenants with right of survivorship and not as tenants in common. The decedent retained possession of the certificates during his lifetime and received all the interest from them. On his death the bank paid the certificates and the remaining interest to the son. In an action by the co-administrator for possession of the certificates and interest, the trial court held that the certificates of deposit were a part of the decedent-purchaser’s estate because there was no delivery and therefore no valid *inter vivos* gift. The Third District Court of Appeals affirmed, Judge Staton dissenting. For an evaluation of *Zehr*, see 8 VAL. U.L. REV. 140 (1973).

⁶315 N.E.2d at 723.

⁷288 N.E.2d at 176. The *Zehr* court listed all the formal elements required for establishing a valid *inter vivos* gift:

(a) [T]he donor must be competent to contract, (b) there must be freedom of will, (c) the gift must be completed and nothing left undone, (d) the property must be delivered by the donor and accepted by the donee and (e) the gift must go into immediate and absolute effect.

The appellate court reversed, holding that the daughter had contractual rights in the certificates as a third party donee-beneficiary. *Zehr* was expressly overruled.⁸ The court explained its actions as follows:

We have adopted the contract theory instead of the gift theory which was properly followed by the trial court in the light of *Zehr v. Daykin*. Only the gift theory was argued in *Zehr v. Daykin*,⁹ and we responded accordingly. The elemental requirements of the gift theory tend to frustrate the intent of the donor. Some of the requirements—in particular the delivery requirement—defy the usual donor's inclination. Other jurisdictions have adopted the contract theory. We are impressed with and persuaded by the apparent success of the contract theory in these jurisdictions.¹⁰

In adopting the contract theory for certificates of deposit, the court first noted that Indiana has long recognized the "inherent contractual nature of certificates."¹¹ The court next quoted the rule for third party donee-beneficiary contracts given in the *Restatement of Contracts*¹² and then elaborated upon the rule. It pointed out that the donee-beneficiary does not have to know of a certificate's existence in order to have a contract right in the certificate.¹³ However, "Indiana recognizes the right of a donor-

The *Zehr* and *Fanning* courts both considered delivery to be the crucial element in establishing a gift in certificate of deposit cases under the gift theory.

⁸315 N.E.2d at 720, 723.

⁹[Author's footnote]. In *Fanning* the daughter specifically argued the contract theory on appeal. *Id.* at 720.

¹⁰*Id.* at 723 (footnotes and citations omitted). The court named the following states as having adopted the contract theory: Iowa, Ohio, South Dakota, Tennessee, Texas, and Wisconsin.

¹¹*Id.* at 720-21, citing *Long v. Strauss*, 107 Ind. 94, 6 N.E. 123 (1886); *Mock v. Stultz*, 97 Ind. App. 138, 179 N.E. 561 (1932); *DeVay v. Dunlap*, 7 Ind. App. 690, 35 N.E. 195 (1893); 8 VAL U.L. REV. 140, 144 n.30 (1973).

¹²

"(1) Where performance of a promise in a contract will benefit a person other than a promisee, that person is . . .

(a) A donee-beneficiary, if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed nor asserted to be due from the promise to the beneficiary;

.
(2) Such a promise as is described . . . is a gift promise. . . ."

315 N.E.2d at 721, quoting from RESTATEMENT OF CONTRACTS § 133 (1932).

¹³315 N.E.2d at 721, citing RESTATEMENT OF CONTRACTS §§ 133 *et seq.* (1932). The specific citation would be to *id.* § 135, Comment (a).

creditor to rescind or modify a third party beneficiary contract";¹⁴ the purchase of the certificate in the name of the purchaser and another constitutes a present gift of only a contingent contract right.¹⁵

The court concluded its analyses of third party donee-beneficiary contracts in the context of certificates of deposit by stating that the intent of the donor controls.¹⁶ Furthermore, although several legitimate reasons can be imagined for a purchaser's putting a certificate in multiple names,¹⁷ "without an expression to the contrary, the third party donee-beneficiary contract creates a rebuttable presumption that the usual rights incident to jointly owned property with the rights of survivorship was intended."¹⁸ Seemingly, the purchaser's signature on a certificate made out to both the purchaser and the donee suffices to raise the presumption of the purchaser's donative intent. Thus, no other document, such as a deposit agreement with the bank, is needed to create the third party contract.¹⁹ Since the presumption raised by the

¹⁴315 N.E.2d at 721, citing 17 AM. JUR. 2D *Contracts* § 317 (1964). Cf. *Zimmerman v. Zehender*, 164 Ind. 466, 73 N.E. 920 (1905).

¹⁵315 N.E.2d at 721, citing *Hibbard v. Hibbard*, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

¹⁶315 N.E.2d at 722, citing *Voelkel v. Tohulka*, 236 Ind. 588, 141 N.E.2d 344 (1957).

¹⁷The court gives three examples of other possible intentions of the donor: (1) Avoiding probate of his estate; (2) establishing a short term, revocable donee-beneficiary contract while the donor is ill or out of state; and (3) using the certificate as a security. 315 N.E.2d at 722. An analogous testamentary device recently recognized in Indiana is the so-called "Totten trust" which arises when a donor deposits funds in a savings account in the name of the donor as trustee for the donee-beneficiary. The trust is revocable at will by the donor but upon his death the balance of the account passes to the beneficiary. The trust is presumed from the intent of the donor. *First Fed. Sav. & Loan Ass'n v. Baugh*, 310 N.E.2d 101 (Ind. 1974), discussed in *Poland, Trusts and Decedents' Estates, 1974 Survey of Indiana Law*, 8 IND. L. REV. 278, 284 (1974).

¹⁸315 N.E.2d at 722. Cf. IND. CODE §§ 28-1-20-1, 28-4-4-2 (Burns 1973).

¹⁹This is the crucial factual difference in the results of *Zehr* and *Fanning*. The *Zehr* court stated that had the donor and donee both signed some type of agreement with the bank, the court would have awarded the certificate to the donee. Although the court stated that where the parties signed these agreements the contract theory would control, it seems rather to be engrafting an exception onto the gift theory; where these writings are present, delivery is not necessary because the writings constitute "conclusive proof of a gift." 288 N.E.2d at 177. In dissent, Judge Staton stated that "the signing of signature cards or other standard forms is at best an artificial distinction. It should not be used to thwart the clear, obvious, and unequivocal intent of the donor." 288 N.E.2d at 177 (Staton, J., dissenting). However, Judge Staton seemed to be relying upon the gift theory.

Although he also adopted the contract theory, Judge Staton carried into the majority opinion he wrote in *Fanning* the same idea of clearly expressed

written document is rebuttable, by implication, the party opposing the donee's right to recover may use parol evidence to show that the purchaser did not intend to give the other party a joint tenancy with rights of survivorship in the certificate. The opposing party also carries the burden of proof.²⁰ Once the purchaser's donative intent is established, the third party beneficiary contract can be varied only by a showing of fraud, undue influence, duress, or mistake. The opposing party also has the burden of proof in establishing any of these defenses, and he may use parol evidence.²¹

Applying these rules to the stipulated facts, the *Fanning* court found that the daughter was entitled to possession of the certificates. Her lack of knowledge of the existence of the certificates could not be a bar. Most importantly, the court found that the mother clearly intended that the daughter receive the certificates upon the mother's death.²² Therefore, the daughter's contingent contract right in the certificates vested upon her mother's death when the daughter accepted these rights.²³ The estate did not establish one of the defenses which could have divested the daughter of possession of the certificates.

A problem with the contract theory not discussed in *Fanning* concerns the rights of a donee-beneficiary when the beneficiary becomes aware of the certificates before the donor's death. Under the contract theory put forward in *Fanning*, the donee has no right in the certificate until the donor's death. Situations may arise, however, where the donee acts in reliance on the certificates and thus may be held to have caused an enforceable contract right to

intent that he emphasized in his *Zehr* dissent. 315 N.E.2d at 722-23. Chief Judge Hoffman, who wrote the majority opinion in *Zehr*, dissented in *Fanning* partly on his acceptance of the reasoning in *Zehr*. *Id.* at 724 (Hoffman, C.J., dissenting). The donor's intent was not specifically listed by the majority in *Zehr* as one of the formal elements under the gift theory, but it is beyond dispute that no gift is made unless the donor intends one. Thus, a common element in both the gift and the contract theories is the donor's intent. The specific elements of both theories are designed to assure that the donor's intent is carried out. The gift theory relies on formalities to accomplish this purpose; the contract theory gives the court more discretion. The problem for the appellate courts is to find the set of rules best designed to effectuate the donor's intent.

²⁰315 N.E.2d at 722.

²¹*Id.* at 722 & n.5.

²²*Id.* at 722-23.

²³*Id.* at 722. The court does not state whether the vesting of the contract rights after the mother's death was automatic or whether the daughter's accepting possession of the certificates or asserting ownership rights in the certificates by receiving interest on them and cashing them constituted acceptance of the contract rights. Acceptance will be presumed if the contract is beneficial to the donee. *Copeland v. Summers*, 138 Ind. 219, 35 N.E. 514 (1893); *Waterman v. Morgan*, 114 Ind. 237, 16 N.E. 590 (1887).

develop.²⁴ While Indiana courts have decided that certificates of deposit made out by the purchaser in multiple names create a contingent contract right in the donee that vests upon the death of the donor, it is altogether unclear whether they will hold that the vesting can be triggered by other occurrences.

XV. The Real Estate Settlement Procedures Act of 1974

*Sheila Suess**

The Real Estate Settlement Procedures Act of 1974¹ was intended to correct what Congress saw as "abusive practices" within the "real estate settlement process."² The stated purposes

²⁴*Blackard v. Monarch's Mfrs. & Distribs., Inc.*, 131 Ind. App. 514, 169 N.E.2d 735 (1960); *RESTATEMENT OF CONTRACTS* § 143(a) (1932). The *Blackard* court stated the rule as follows:

It is a general rule that where a contract for the benefit of a third person has been accepted or acted upon, it cannot be rescinded by the parties without the consent of the third person.

131 Ind. App. at 522, 169 N.E.2d at 739. The *Restatement of Contracts* section 143(a) states the rule as follows:

A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if,

(a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation

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¹12 U.S.C.A. §§ 2601-16 (Supp. 1, 1975) [hereinafter referred to as the Act].

²*Id.* § 2601. The 1975 Indiana General Assembly, perceiving some of the same problems, amended the Indiana Uniform Consumer Credit Code. IND. CODE §§ 24-4.5-2-101 to -6-203 (Burns 1974). The amendment provides that an additional charge may be contracted for in connection with a consumer loan

(d) with respect to a debt secured by an interest in land, the following closing costs, if they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this article:

(i) fees or premiums for title examination, abstract of title, title insurance, surveys, or similar purposes;

(ii) fees for preparation of a deed, settlement statement or other documents, if not paid to the lender or a person related to the lender;

(iii) escrows for future payments of taxes, including assessments for improvements, insurance, and water, sewer and land rents;

(iv) fees for notarizing deeds and other documents, if not paid to the lender or a person related to the lender; and

of the Act are to effect more adequate advance disclosure of settlement costs to home buyers and sellers, to eliminate so-called "referral fees" or kickbacks, and to reduce amounts home buyers are required to keep in escrow accounts. A subsidiary purpose of the Act is the eventual reform and modernization of local land title record keeping procedures.³ In order to achieve these goals, the Secretary of the Department of Housing and Urban Development (HUD) promulgated Regulation X⁴ and prescribed a Uniform Disclosure/Settlement Statement (HUD Form 1) which is to be used in all transactions covered by the Act.⁵

A. Covered Transactions

The Act covers "federally related home mortgage" loans.⁶ Regulation X defines a "home mortgage," the first prerequisite to coverage, as a loan secured by residential real estate designed to be occupied by from one to four families, including mobile homes and individual units of condominiums and cooperatives.⁷ The funds loaned may be secured by any lien or security interest in real estate, including a leasehold interest, if there is a structure on the land designed for occupancy by one to four families. The proceeds of the loan must be applied toward the purchase or transfer of the property. Home improvement loans are not covered, nor is refinancing by an owner of real estate, where there is no transfer of title. Vacant lots are covered only if the proceeds of the loan are to be used to construct a dwelling.⁸

The second prerequisite to coverage is that the loan be "federally related."⁹ "Federally related" loans are those made in whole or in part by any lender the accounts of which are insured by any agency of the federal government or which is regulated in any way by an agency of the federal government.¹⁰ The loan

(v) appraisal fees, if not retained by the creditor

Id. § 24-4.5-3-202(1)(d) (Burns Supp. 1975), *amending id.* § 24-4.5-3-202 (Burns 1974). This additional charge must be disclosed to the consumer. *Id.* § 24-4.5-3-306 (Burns 1974).

³12 U.S.C.A. § 2601(b) (Supp. 1, 1975).

⁴40 Fed. Reg. 22,449-54 (1975) [hereinafter cited as Reg. X].

⁵HUD Form 1, Uniform Disclosure/Settlement Statement, Reg. X, § 82.6 (a) [hereinafter referred to as HUD Form 1]. HUD Form 1 and instructions for its use are set forth in Appendices A and B to Regulation X. *See* 40 Fed. Reg. 22,454-58 (1975). The use of a uniform settlement statement was mandated by the Act. 12 U.S.C.A. § 2603 (Supp. 1, 1975).

⁶12 U.S.C.A. § 2603 (Supp. 1, 1975).

⁷Reg. X, § 82.2(e).

⁸*Id.* §§ 82.2(e)(2), 82.4(a).

⁹12 U.S.C.A. § 2603 (Supp. 1, 1975).

¹⁰*Id.* § 2602(1)(B)(i); Reg. X, § 82.2(e)(4).

also is "federal related" if it is guaranteed, supplemented or assisted by any officer or agency of the federal government or if it is issued under any federal housing program.¹¹ Further, any mortgage eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation is "federally related."¹² Finally, the loan will be covered by the Act if the lender makes, or invests in, residential real estate loans aggregating more than \$1 million a year.¹³ The term "lender" includes the creditor in both new mortgage loans and in assumptions.¹⁴

Purchases of property for resale by one engaged in the business of buying and selling real property are exempt from certain portions of the Act under the regulations;¹⁵ apparently, in such cases a lender need not make the detailed disclosure otherwise necessary since such a borrower is not the typical consumer the legislation was designed to protect. However, one who engages in the purchase and resale of residential real estate is subject to disclosure requirements upon the sale of such real estate.¹⁶

B. *The Law and the Mortgage Lender*

What are the lender's responsibilities under the Act and Regulation X? First, the lender must provide every mortgage loan applicant at the time of the application with a booklet prepared and distributed to lenders by HUD.¹⁷ The booklet discusses the provisions of the Act, the reasons for its passage, and the various steps involved in settlement. Regulation X provides that the booklet must be delivered to, or placed in the mail to, the loan applicant no later than the third business day after receipt of the loan application.¹⁸

Furthermore, the lender must make timely use of HUD Form 1 for both advance disclosure and settlement. The form itemizes all charges involved and indicates whether they are being imposed upon the buyer or the seller. It is designed to include all disclosures required by the Truth in Lending Act.¹⁹ It also includes

¹¹12 U.S.C.A. § 2602(1)(B)(ii) (Supp. 1, 1975).

¹²*Id.* § 2602(1)(B)(iii).

¹³*Id.* § 2602(1)(B)(iv).

¹⁴Reg. X, § 82.2(d).

¹⁵*Id.* § 82.4(b).

¹⁶12 U.S.C.A. § 2606(a) (Supp. 1, 1955).

¹⁷*Id.* § 2604; Reg. X, § 82.5. The *Special Information Booklet* is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

¹⁸Reg. X, § 82.5(a).

¹⁹15 U.S.C. §§ 1601-65 (1970). Regulation Z was promulgated by the Federal Reserve Board to implement the Truth in Lending Act. The present

the amount of the premium charged for title insurance, as well as the interest which is thereby insured—borrower's, lender's or both.²⁰ Advance disclosure of settlement costs must be made by the lender—by mail or in person and on HUD Form 1—not later than 7 calendar days after the loan commitment is made, and at least 12 days (15 if the form is mailed) prior to settlement.²¹ If for some reason settlement is to be delayed more than 60 days after commitment, disclosure may be made 60 days before the anticipated date of closing.²²

The critical period involved in the requirement of advance disclosure is the 12-day period between such disclosure and settlement. The Regulation provides that this requirement may be reduced to three days between actual receipt of the advance disclosure form and settlement, if settlement occurs within 21 days of application for the loan and if both buyer and seller voluntarily execute the prescribed form of waiver. The waiver is of advance disclosure only; it does not operate to waive any rights of rescission under the Truth in Lending Act.²³ The required form of the waiver is set out in the Regulation.²⁴

It is also the lender's duty to obtain from persons providing services connected with settlement the charges that will be made for such services and to enter those charges on the form.²⁵ Where the exact amount of some charge required to be included on the advance disclosure statement is not yet certain, a good-faith estimate is permitted. However, each estimate must be stated as a specific figure and not as a possible range. Figures which are estimated are to be followed by an "(e)."²⁶ If the borrower obtains his own hazard insurance without involvement by, or referral from, the lender, real estate agent or broker, or person conducting the settlement, the amount of premium of such insurance may be omitted.²⁷ Similarly, if the buyer or seller uses his attorney, the charges made to that party by his own attorney need not appear. Any other charges by attorneys in connection with the settlement must be disclosed.²⁸ Other services independently obtained by a

version of Regulation Z appears in 12 C.F.R. pt. 226 (1975).

²⁰12 U.S.C.A. § 2603 (Supp. 1, 1975); Reg. X, §§ 82.6 to .11.

²¹Reg. X, § 82.7(b).

²²*Id.* § 82.7(c).

²³*Id.* § 82.7(d). *See* 15 U.S.C. § 1635 (1970); Reg. Z, 12 C.F.R. § 226.9 (1975) (requirements to waive right of rescission under the Truth in Lending Act).

²⁴Reg. X, § 82.7(d).

²⁵*Id.* § 82.7(g).

²⁶*Id.* § 82.7(f).

²⁷*Id.* § 82.7(h).

²⁸*Id.* § 87.7(i).

buyer or seller (such as a Certified Home Corporation home inspection) likewise do not have to be stated.²⁹ Lenders may make disclosure of adjustments for taxes and assessments based on the assumption that these are not delinquent.³⁰

Updating, although permitted, is not required if the lender discovers changes in some of the reported charges after he has provided the advance disclosure statement.³¹ The lender must keep a copy of the advance disclosure statement for two years, unless the mortgage is transferred, in which case it may be turned over to the transferee with the rest of the loan file.³² The lender is not permitted to charge a fee for preparing the advance disclosure statement.³³

HUD Form 1, which is used for advance disclosure, is also to be used as a settlement statement, which must be provided to the borrower and seller within three days after the date of settlement.³⁴ Again, the lender must keep a copy of the settlement statement for two years, unless the mortgage is transferred before the expiration of that period.³⁵ The lender must keep both the advance disclosure and settlement statements in addition to all other records required by Regulation Z of the Federal Reserve Board.³⁶ However, provisions of the Act do supersede section 1631(c) of the Truth in Lending Act³⁷ to the extent the latter applies to "federally related home mortgage" loans.³⁸

If construction of the residence involved has been completed for twelve months, the lender cannot make a loan commitment until confirming that the seller, in writing, has furnished to the buyer the following information: (1) The name and address of the present owner; (2) the date the property was acquired by such owner (but if more than two years have passed, the year of acquisition is sufficient); and (3) if the present owner has owned the property for less than two years and has not used it as his residence, the date and purchase price of the last arms-length transfer of the property, together with the cost of any subsequent improvements, excluding maintenance costs.³⁹

²⁹*Id.* § 82.7(j).

³⁰*Id.* § 82.7(k).

³¹*Id.* § 82.7(l).

³²*Id.* § 82.7(m).

³³12 U.S.C.A. § 2610 (Supp. 1, 1975).

³⁴Reg. X, § 82.8(a), (c).

³⁵*Id.* § 82.8(d).

³⁶*Id.* §§ 82.7(m), .8(d). *See* Reg. Z, 12 C.F.R. § 226.6(i) (1975).

³⁷15 U.S.C.A. § 1631(c) (Supp. 1, 1975), *amending* 15 U.S.C. § 1631 (1970).

³⁸12 U.S.C.A. § 2605(e) (Supp. 1, 1975).

³⁹*Id.* § 2606(a).

C. Prohibited Acts

The Act forbids giving or accepting any "fee, kickback, or thing of value" arising under any sort of arrangement where business incident to a real estate settlement is "referred" to any person or institution.⁴⁰ The Act also prohibits giving or accepting any "portion, split or percentage of any charge made or received" for services connected with such settlement other than for services actually performed.⁴¹

A lender may not require a borrower to deposit in an escrow account a sum which exceeds the borrower's pro rata portion of taxes and insurance which will actually be due and payable on the date of settlement. After settlement, the lender can require deposit in the escrow account each month only one-twelfth of the total taxes and insurance premiums which will be actually due and payable during the following 12-month period. Should it appear that there will be a deficiency, the lender may, however, adjust the monthly deposit to cover it.⁴²

The Act prohibits sellers from requiring that title insurance be purchased from any particular company;⁴³ and, as noted previously, a lender who charges a fee for preparation of the disclosure documents violates the Act.⁴⁴

D. Penalties

If a lender fails to provide a borrower or seller with the required disclosures, the lender will be liable to the aggrieved party in an amount equal to the greater of actual damages or five hundred dollars, plus court costs and an attorney's fee. The lender escapes liability only if the lender can show by a preponderance of the evidence that (1) The omission resulted from a bona fide mistake and was not intentional and (2) the lender maintains procedures adopted to avoid such errors.⁴⁵ Borrowers may not sue both under the Act and under section 1640 of the Truth in Lending Act,⁴⁶ but must elect which remedy to pursue.⁴⁷

"Knowing and willful" noncompliance with the requirement of disclosure by the seller of the previous purchase price as a precondition to the loan commitment carries a fine of up to \$10,000

⁴⁰*Id.* § 2607(a).

⁴¹*Id.* § 2607(b)-(c).

⁴²*Id.* § 2609.

⁴³*Id.* § 2608.

⁴⁴*Id.* § 2610.

⁴⁵*Id.* § 2605(b).

⁴⁶15 U.S.C.A. § 1640 (Supp. 1, 1975), *amending* 15 U.S.C. § 1640 (1970).

⁴⁷12 U.S.C.A. § 2605(d) (Supp. 1, 1975).

or one year in prison, or both.⁴⁸ Parties violating the section prohibiting kickbacks and unwarranted charges may be fined \$10,000 or imprisoned for one year or both, and, in addition, will be jointly and severally liable for three times the amount of the fee, portion, split, or percentage.⁴⁹

An action for damages under the Act must be brought within one year from the date of the violation. Jurisdiction is concurrent in the state and federal courts.⁵⁰

XVI. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

A. Security Interests in Real Property

1. Priorities—Bona Fide Purchaser; Possession as Notice

It is settled that a bona fide purchaser will take priority over prior unperfected interests in land.¹ The recent case of *Huffman v. Foreman*² dealt with two issues closely related to this principle: (1) Must a purchaser make further inquiry where he is told by the seller that there was a prior interest in the land but that it has been released or satisfied? (2) Is the purchaser charged with constructive notice when the claimant to an interest in the land is in possession? In *Huffman* an owner sold his land on a conditional sales contract, and the purchaser obtained possession. Although the purchaser remained in possession, he conveyed the land back to the owner for an executory consideration of \$13,500. The court determined that the purchaser retained a vendor's lien for the \$13,500 repurchase price.³ The owner, thereafter, conveyed

⁴⁸*Id.* § 2606(c).

⁴⁹*Id.* § 2607(d).

⁵⁰*Id.* § 2614.

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The author wishes to thank Richard Dick for his assistance in the preparation of this article.

¹*Pugh v. Highley*, 152 Ind. 252, 53 N.E. 171 (1899).

²323 N.E.2d 651 (Ind. Ct. App. 1975).

³Apparently neither the conditional sales contract nor the reconveyance to the owner were recorded. *Id.* at 653-54. An additional problem occurs when the vendor's lien is not perfected; the unperfected vendor's lien will be defeated by a bona fide purchaser from the vendee. *Hawes v. Chaille*, 129 Ind. 435, 28 N.E. 848 (1891); *Heuring v. Stiefel*, 85 Ind. App. 102, 152 N.E. 861 (1926). A holder of a vendor's lien may protect himself by filing suit for a declaration of his rights and also by filing lis pendens notice. *Wilson v. Burgett*, 131

his interest to a second purchaser. The second purchaser withheld only \$10,000 of the purchase money he owed the owner to pay off the first purchaser upon the erroneous information supplied by the owner that this was the amount owing.⁴

The court held that a transferee obtaining knowledge from his seller of an outstanding unrecorded interest in land cannot rely upon the seller's oral representation that the interest has been released. He must make further inquiry. In other words, the second purchaser was not a bona fide purchaser. The court posited the reasonable care standard as the test for determining a purchaser's notice or knowledge. The standard provides that a purchaser with knowledge of facts sufficient to put a reasonable and prudent person on a duty of further inquiry is charged with notice of all matters which could have been discovered if reasonable inquiry had been pursued.⁵ *Huffman* teaches that once a purchaser is supplied with information of an outstanding claim to property, reasonable care requires that he seek out hard evidence with respect to the status of the claim before he pays value.

The *Huffman* court did not discuss whether the conditional buyer's possession was sufficient to put the owner's grantee on notice of his claim. The generally accepted rule is that possession serves as constructive notice of the possessor's interest in the land.⁶ However, Indiana decisions have held that the grantor's possession under an absolute deed is insufficient to charge purchasers from his grantee with constructive notice of his interest.⁷ This exception

Ind. 245, 27 N.E. 749 (1891). A purchaser under an unperfected land contract will be defeated by a subsequent bona fide purchaser for value from the first purchaser's vendor. *But cf.* *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958) (purchaser of equitable interest not protected).

⁴The owner was to pay the \$13,500 repurchase price with a \$5,000 down payment and a note for the balance. 323 N.E.2d at 653.

⁵*Accord*, *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1936). A presumption of good faith arises when value has been paid. IND. R. TR. P. 9.1(D).

⁶When a grantee, vendee, or transferee holds possession, decisions almost unanimously hold that subsequent purchasers from the transferor must take notice of the transferee's possession and of other matters that reasonable inquiry would disclose. *See, e.g.,* *Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1956); *McClellan v. Beatty*, 115 Ind. App. 173, 53 N.E.2d 1013 (1944). Indiana, incorrectly it is submitted, recognizes a "lazy banker" rule as an exception. *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1936) (vendee's three-day possession was insufficient to impart notice to a banker who took a mortgage without other notice). Possession by a family member is not constructive notice of a transfer from one family member to another family member in possession. *Paulus v. Latta*, 93 Ind. 34 (1883).

⁷*Tuttle v. Churchman*, 74 Ind. 311 (1881); *Bryan v. Reiff*, 84 Ind. App. 516, 150 N.E. 800 (1926).

supposedly resolves the inconsistency caused by the grantor's retention of possession as against his execution of an absolute conveyance. However, as indicated by the problem raised in *Huffman*, the Indiana exception to the general rule does not make much sense. Where the first purchaser is a conditional purchaser in possession, persons dealing with the owner are required to take notice of the first purchaser's interest.⁸ On the other hand, if the first purchaser is the holder of a vendor's lien after his reconveyance to the owner, his possession would not, under the Indiana exception, be sufficient to charge those buying from the owner with notice of the first purchaser's lien.⁹ In either case, possession should constitute notice and should serve as an effective means of perfection. By making inquiry the prospective purchaser can easily ascertain the interest of claimants in possession, and he ought to do this in all cases.

2. Vendor's Lien

A grantor who deeds or conveys an interest in land in exchange for an executory consideration ordinarily cannot rescind or avoid the transaction if the grantee fails to perform his part of the bargain.¹⁰ However, equity protects the grantor in such a case by allowing the seller a vendor's lien upon the interest conveyed as security for the grantee's executory performance.¹¹ A vendor's lien has been applied in favor of the owner of almost any interest in land, including that of a purchaser under a con-

⁸*Mowrey v. Davis*, 12 Ind. App. 681, 40 N.E. 1108 (1895). See note 6 *supra*.

⁹*But cf. Melross v. Scott*, 18 Ind. 250 (1862) (deed from vendor in possession recited that purchase money was unpaid).

¹⁰*McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (1907). In other words, the law does not imply a parol condition subsequent upon a valid, present transfer of property. If the transferee's promised performance fails, title will not automatically revert to the transferor. However, Indiana and a few states recognize an exception when a deed conveying land is executed in exchange for a promise of support. The courts generally apply an implied condition subsequent upon breach of the duty to support. See, e.g., *Cree v. Sherfy*, 138 Ind. 354, 37 N.E. 787 (1894); *Owens v. Downs*, 121 Ind. App. 294, 98 N.E.2d 914 (1951). Even in this case the grantor may elect to enforce a vendor's lien on the property rather than claim a right of re-entry. *Lowman v. Lowman*, 105 Ind. App. 102, 12 N.E.2d 961 (1938). See also RESTATEMENT OF CONTRACTS § 354 (1932).

¹¹*Old First Nat'l Bank v. Scheuman*, 214 Ind. 652, 13 N.E.2d 551 (1938). The vendor's lien does not apply to the sale of personal property. This rule was recognized but not applied in *Scheuman*, where the vendor sold realty and personal property for one gross price.

tract to purchase land who sells his interest to a second vendee¹² and fails to receive his bargained consideration for the transfer.

These principles again were recognized in *Huffman v. Foreman*,¹³ which extended the vendor's lien to a purchaser under a conditional sales contract who reconveyed the property to his vendor by an informal instrument of transfer. When the vendor failed to fulfill his agreement to pay for the reconveyance, the court held that although the purchaser could not rescind the reconveyance, he was entitled to a vendor's lien. By treating a reconveying purchaser as a "vendor" entitled to a vendor's lien, the court made use of a novel application of this equitable concept to protect the purchaser when the original vendor did not complete his promised performance following the reconveyance.

Because the reconveyance by the purchaser operated as a satisfaction of his obligation under the original conditional sale, *Huffman* raises the question of whether a vendor's lien may be asserted in all cases where a party to a mortgage, lien, or contract with respect to real estate releases his rights for a consideration which fails. For example, suppose that a mortgagee of land executed a release to his mortgagor for a promised performance which later is breached. Can the mortgagee properly claim a vendor's lien?¹⁴ The answer remains unclear partly because the vendor's lien is inapplicable to cases involving personal property.¹⁵ Since under the lien theory of mortgages, the mortgagee's interest constitutes personal property,¹⁶ a release of that interest arguably

¹²*Scott v. Edgar*, 159 Ind. 38, 63 N.E. 452 (1902); *Smith v. Mills*, 145 Ind. 334, 43 N.E. 564 (1896); *Johns v. Sewell*, 33 Ind. 1 (1870); *Baldwin v. Siddons*, 46 Ind. App. 313, 90 N.E. 1055 (1910). Based upon the erroneous idea that a vendee holding under an option to purchase land acquires no interest in land, it has been held that the vendee selling his rights under the option has no vendor's lien. Compare *Tyler v. Tyler*, 111 Ind. App. 607, 40 N.E.2d 983 (1942), with *Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1955).

¹³323 N.E.2d 651 (Ind. Ct. App. 1975).

¹⁴A mortgagee may avoid a release obtained as a result of fraud, mistake, and the like. *Slushnik v. Walerko*, 105 Ind. App. 211, 13 N.E.2d 335 (1938) (fraud); *Jefferson Park Realty Corp. v. Riggely*, 99 Ind. App. 146, 189 N.E. 381 (1934) (fraud); *Wells v. Huffman*, 69 Ind. App. 379, 121 N.E. 840 (1919) (mistake); *McConnell v. American Nat'l Bank*, 59 Ind. App. 319, 103 N.E. 809 (1915) (right to avoid release obtained by fraud could not be asserted against purchaser from fraudulent mortgagor on the basis of estoppel).

¹⁵A vendor's lien is not recognized in the sale of personal property. *Johnson v. Jackson*, 284 N.E.2d 530 (Ind. Ct. App. 1972), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 226, 228 (1973). See also notes 10 & 11 *supra* & accompanying text.

¹⁶"In Indiana a mortgage is a lien—a mere security for the debt. The mortgagee has no title to the land mortgaged." Gross Income Tax Div.

cannot be subject to a vendor's lien.¹⁷ However, if a mortgagor conveys his interest to a mortgagee who defaults on the promised return consideration, as in *Huffman*, there is no reason why the mortgagor should not be allowed to claim a vendor's lien.¹⁸

3. *Mortgage Foreclosure and Redemption Period*

Prior to July 1, 1931, real property judicially foreclosed could be redeemed within one year after the sale. The mortgagor was permitted to retain possession during this period.¹⁹ Where the mortgage was executed after July 1, 1931, possession and the right of redemption continued only until the sale, which could not be held for one year after the foreclosure complaint was filed.²⁰ In 1957 the redemption and possession period was reduced to six months for mortgages executed on or after July 1, 1957.²¹ The 1975 General Assembly has once again reduced the redemption and possession period by permitting foreclosure three months after the filing of the complaint. This shortened period applies only to mortgages executed on or after July 1, 1975. An extended possession and redemption period of 12 months was provided for mortgages executed after June 30, 1957, and before January 1, 1958, and also for mortgages executed prior to July 1, 1931,²² thereby retroactively modifying foreclosure redemption procedures with respect to such mortgages.

v. Colpaert Realty Corp., 231 Ind. 463, 469, 109 N.E.2d 415, 418 (1952). Under the equitable theory of mortgages, the mortgagee holds only an interest in personal property. *Gabbert v. Schwartz*, 69 Ind. 450 (1880) (security follows the debt).

¹⁷However, an old decision appears to hold that the release of a mortgage is ineffective upon failure of the bargained for executory consideration given in exchange for the release. *Harris v. Boone*, 69 Ind. 300 (1879) (decided apparently upon the theory that the bargained consideration was a condition precedent to effectiveness of release). Compare *Hanlon v. Doherty*, 109 Ind. 37, 9 N.E. 782 (1886) (release executed on the basis of unilateral mistake is ineffective). Where the mortgagee transfers the debt to the mortgagor, the lien is presumptively discharged by merger. *Belk v. Fossler*, 49 Ind. App. 248, 96 N.E. 15 (1912). However, equity will not permit merger where proof shows that it was not intended or would operate unfairly. Compare *Smith v. Ostermeyer*, 68 Ind. 432 (1879), with *McCrory v. Little*, 136 Ind. 86, 35 N.E. 836 (1893).

¹⁸A transfer of the mortgagor's interest to the mortgagee merges title in the mortgagee, presumptively discharging the mortgagor upon his debt. *Cook v. American States Ins. Co.*, 150 Ind. App. 88, 275 N.E.2d 832 (1971).

¹⁹Ch. 88, § 2, [1881] Ind. Acts 593 (repealed 1931). The purchaser at the sale was given a certificate of purchase until the year expired, at which time he was given a deed if the property was not redeemed. *Id.* § 1.

²⁰Ch. 90, § 1, [1931] Ind. Acts 257 (repealed 1957).

²¹Ch. 220, § 1, [1957] Ind. Acts 476 (repealed 1975).

²²IND. CODE § 32-8-16-1 (Burns Supp. 1975).

The strange provision which retroactively extended the possession and redemption period for the specific dates set out above clearly constitutes special legislation, though not an impairment of contract rights.²³ The Indiana Rules of Trial Procedure passed by the General Assembly and adopted by the Indiana Supreme Court in 1970 made procedures for foreclosure of real estate mortgages, including provisions relating to possession and redemption rights, applicable to all other execution and lien foreclosures.²⁴ There is no logical reason why five years later mortgages should receive special treatment over execution and other lien foreclosures. Any justification for a 3-month prospective redemption and possession period applies across the board. The Indiana Supreme Court would, therefore, be wise to either throw this new statute out or to construe or amend its rules to provide for a uniform foreclosure period.

Special interest groups "ramrodding" legislation through the rush of an annual session of the legislature should be put on notice that their responsibilities extend to the whole class of persons affected by the change of law they seek. By placing themselves in a special class without good reason, these groups defeat the spirit behind the idea of equal protection. The redemption laws, whether procedural or substantive in character, should apply uniformly and fairly to all classes of liens. If our legislature does not honor the principles of fair play, the judiciary at least must recognize and enforce these basic ideals.

This same amendment to the foreclosure statute also permits the mortgagor to contract away, or "clog," the time limits under which he may exercise his right of redemption. In exchange, the mortgagee must give up his right to a deficiency.²⁵ This type of agreement probably was barred under the prior law, which held

²³*Indiana High School Athletic Ass'n v. Raike*, 329 N.E.2d 66 (Ind. Ct. App. 1975) (married student denied right to participate in athletics denied equal protection). It has been held that legislative modification of redemption rights upon foreclosure of a mortgage are procedural, and, therefore, they are not protected by constitutional provisions prohibiting impairment of contract. *Anderson v. Anderson*, 129 Ind. 573, 29 N.E. 35 (1891) (discussing prior conflict of authority); cf. *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502 (1938) (upholding congressional extension of redemption period under bankruptcy power).

²⁴IND. R. TR. P. 63.1(A) & (C). Since judicial foreclosure is made subject to the same procedures applicable to mortgage foreclosure, it may be reasonable to hold that the redemption period in all cases has been reduced. *Id.* 69(C). However, the 6-month redemption period allowed in the case of execution sales is not worded so that it depends upon the rule in mortgage foreclosure; the debtor is given 6 months to redeem after the judgment creditor's judgment or execution lien attaches. *Id.* 69(A).

²⁵IND. CODE § 32-8-16-1.5 (Burns Supp. 1975).

that the mortgagor could not surrender his possession or redemption rights.²⁶ Clearly, however, the mortgagor could transfer title to the mortgagee for a fair consideration after execution of the mortgage.²⁷ The new legislation does contain some important restrictions on the mortgagor's transfer of his remaining rights. The waiver of rights must be filed by the owner-mortgagor with the clerk and must include the consent of the mortgagee by endorsement on it. This waiver of redemption rights can be made only after the mortgagee has recovered judgment. This last provision is treacherously deceptive because it will be advantageous to a mortgagee only where the mortgagor is judgment proof or wholly insolvent; on the other hand, it will benefit a mortgagor only where he is able to pay a deficiency. This provision is also subject to the criticism, discussed above, insofar as it does not apply to all executions and liens. Further, it does not deal with the rights of junior lienholders who will be unaffected by a waiver between the mortgagor and a senior mortgagee.

4. *Outright Deed as Equitable Mortgage*

It is a basic tenet of securities law that an outright deed may be proved to be a mortgage and that evidence may be used to establish this fact without violating either the parol evidence rule or the Statute of Frauds.²⁸ If the grantor can prove that the deed was given as security, he may redeem by paying off the indebtedness and forcing the grantee to foreclose by appropriate foreclosure procedures.²⁹

²⁶*Federal Land Bank v. Schleeter*, 208 Ind. 9, 194 N.E. 628 (1935) (provision in mortgage giving mortgagee right to a receiver during period of redemption held invalid).

²⁷*Esch v. Leitheiser*, 117 Ind. App. 338, 69 N.E.2d 760 (1946) (transfer to mortgagee in full payment of debt upheld); cf. *Hackleman v. Goodman*, 75 Ind. 202 (1881).

²⁸The rule is not based upon proof of fraud or wrongdoing, but rather upon the ancient equitable concept that the debtor is in a vulnerable bargaining position. Cf. *Hobbs v. Rowland*, 136 Ky. 197, 123 S.W. 1185 (1909). An express agreement that the grantee will reconvey is not required to prove that an absolute deed is a mortgage, but such an agreement is most convincing. Cf. *Butcher v. Stultz*, 60 Ind. 170 (1877). Several other facts can be considered in determining whether an outright deed is a mortgage. How great was the amount of the consideration received by the grantor relative to the value of the property? *White v. Redenbaugh*, 41 Ind. App. 580, 82 N.E. 110 (1907). Did the grantor retain possession of the property? *Barber v. Barber*, 117 Ind. App. 156, 70 N.E.2d 185 (1946). Was there a prior or contemporaneous debt? *White v. Redenbaugh*, 41 Ind. App. 580, 82 N.E. 110 (1907). However, an indebtedness is not required. *Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949) (grantor had option to pay off debt).

²⁹*Davis v. Landis*, 114 Ind. App. 665, 53 N.E.2d 544 (1944). However, since the mortgagor's rights under an equitable mortgage must be established

In *Huffman v. Foreman*³⁰ the court found an outright deed to be a mortgage from the second purchaser's testimony that the property was to be reconveyed when the grantor repaid funds given him in the first exchange.³¹ Although the court noted that this finding was not essential to its holding, the decision stands as a helpful reminder that equity will not permit a grantee to hide the real purpose behind an outright deed taken to secure an advance, an indebtedness, or even an option to repurchase.

5. Subordination Agreement

An interesting problem arises when a senior lienholder who is under a subordination agreement with a junior lienholder breaches its agreement to give the subordinated junior lienholder notice of the debtor's default and time to cure the default before foreclosure. The senior lienholder in *Calumet Federal Savings & Loan Association v. Lake City Trust Co.*³² breached the subordination agreement. The court properly held that the junior lien was not elevated to a position of priority because of the breach. The junior lienholder's remedy was confined to a recovery of damages suffered.³³ His damages were computed on the basis of the fair market value of the property on the date of the breach (the date of foreclosure by the senior lienholder) less the amount of the senior lien. However, the junior lienholder could not recover any amount that exceeded the value of the junior lien, and interest accruing after the breach was not includable in determining the value of the junior lien.³⁴

in equity, he may be defeated by estoppel, laches, and other rules of equity. *Ferguson v. Boyd*, 169 Ind. 537, 81 N.E. 71 (1907); *Raub v. Lemon*, 61 Ind. App. 59, 108 N.E. 631 (1915).

³⁰323 N.E.2d 651 (Ind. Ct. App. 1975). The grantee in this case claimed priority over a previously retained vendor's lien as a bona fide purchaser.

³¹For a case in accord to the effect that an option to repurchase in favor of the grantor will be construed as a mortgage, see *Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949).

³²509 F.2d 913 (7th Cir. 1975).

³³Since the junior lienholder had fully performed by executing the subordination agreement, he was barred from rescinding for breach of a unilateral contract. In *Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975), a similar rule was applied in the case of a reconveyance by a conditional purchaser.

³⁴The court recognized that upon breach of the subordination agreement, and after default by the debtor, the junior lienholder could have cured or foreclosed his own lien. The computation of his damages would have been less than those permitted under the formula applied by the court. However, in computing the amount of the junior lien, the court disallowed a 24 percent interest penalty which apparently had accrued at the time of breach because of the borrower's prolonged resistance to a foreclosure action.

6. Conditional Sales Contracts

Indiana has adopted a fairly clear policy that a conditional seller of real estate may not reclaim his property and declare a forfeiture for nonperformance of conditions in the agreement but must foreclose his lien by judicial proceedings.³⁵ This rule was recently applied in *Fisel v. Yoder*.³⁶ The plaintiffs in *Fisel* entered into a conditional sales contract for the purchase of a farm. They had paid \$11,400 on the purchase price of \$42,000 and had made substantial improvements on the property shortly before a barn on the property was destroyed by fire. When the purchasers attempted to apply an insurance check payable to them and the vendor for the loss of the barn toward the balance owing on the contract, the defendant-vendor refused to indorse the check and apply it as requested. Further, the vendor stated that the plaintiffs were in breach of the contract, having failed to carry adequate insurance and having made improvements without consent, and that a forfeiture would be declared if the breaches were not cured. At that point, the purchasers tendered payment in full for the balance of the contract price, but the owner refused the tender. Shortly thereafter the purchasers filed a complaint for specific performance, and the vendor counterclaimed for forfeiture and possession of the property. After reviewing the recent cases considering forfeiture under conditional sales contracts, the court held that the vendor was not entitled to a forfeiture since the purchasers had not breached the contract. The court further held, that upon material breach by the vendor, the purchasers were entitled to seek specific performance even though the contract permitted payment only at a specific, later date.³⁷

7. Deed in Consideration of Support

Once again the Indiana Court of Appeals dealt with a problem arising from the informal estate plan of a grantor of real

³⁵*Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974).

³⁶320 N.E.2d 783 (Ind. Ct. App. 1974). Forfeiture was asserted by the defendant because the plaintiffs had failed to carry insurance equal to the unpaid portion of the contract and also because major improvements had been made without the defendant's written consent, as required by the contract. The court, however, refused to award attorney's fees to the vendor "for forfeiture" as specified by the contract since the vendor was denied a right to declare a forfeiture.

³⁷The court found that since the vendor was required to "make his proof of good title available for the inspection of the purchasers prior to the final payment" his refusal to do so, along with his threat of forfeiture, was a material breach which entitled the purchasers to specific performance. *Id.* at 789. However, it appears that the court granted specific performance of the

estate carried out by a deed given in exchange for support.³⁸ In *Robinson v. Railing*³⁹ the deed in question recited that it was given in consideration that the "grantees hereby agree to care for the grantor and furnish all food, clothing, lodging, medical and hospital care during his lifetime and furnish suitable burial at his death" The court construed this language as establishing a covenant, and not a condition precedent or subsequent. Thus, upon breach by the grantees, the grantor could only declare a lien for damages, and could not claim a right to re-enter for condition broken.⁴⁰

B. Security Interests in Personal Property

1. Motor Vehicles

The General Assembly, in an obvious attempt to prevent the illegal transfer of certificates of title and identification numbers from salvaged vehicles to stolen vehicles, has recently enacted a statute requiring the issuance of salvage titles.⁴¹ This statute covers all motor vehicles, semitrailers, or house cars "which, by reason of condition or circumstance, have been declared salvage."⁴² The statutory requirements provide for the issuance of a salvage title by the bureau of motor vehicles for vehicles declared a total loss or salvage as a result of damage, theft, or other occurrence. The applicant must pay a fee and surrender a properly notarized certificate of title for the vehicle before the salvage title will issue.⁴³ The title may be assigned once to another buyer. Registered dealers are permitted an additional assignment.⁴⁴ If the vehicle is restored to proper operating condition, a regular certificate of title, based on the salvage title, may once again be issued.⁴⁵ It is thus necessary

contract along with a conditional right to prepay the contract on the dates specified in the contract. *Id.* at 789-90.

³⁸A number of cases have considered similar agreements. See *Deckard v. Kleindorfer*, 108 Ind. App. 485, 29 N.E.2d 997 (1940); *Lowman v. Lowman*, 105 Ind. App. 102, 12 N.E.2d 961 (1938); *Huffman v. Rickets*, 60 Ind. App. 526, 111 N.E. 322 (1916).

³⁹318 N.E.2d 373 (Ind. Ct. App. 1974). In another recent decision the court construed a similar provision in the deed as a covenant, but failed to accord it proper status as a lien. *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972), *discussed in* Townsend, *supra* note 15, at 229.

⁴⁰The court allowed the grantor to recover damages measured by his loss of bargain. This case is in accord with the general rule stated in earlier cases. See, e.g., *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972); cases cited in note 38 *supra*.

⁴¹IND. CODE §§ 9-1-3.6-1 to -12 (Burns Supp. 1975).

⁴²*Id.* § 9-1-3.6-1(a).

⁴³*Id.* § 9-1-3.6-2.

⁴⁴*Id.*

⁴⁵*Id.* § 9-1-3.6-9.

for those desiring to take a security interest in a salvaged vehicle undergoing restoration to have the interest noted on the salvage title by the bureau of motor vehicles; otherwise, upon the restoration of the vehicle and the issuance of a new certificate of title, the security interest will be lost. Once noted on the salvage title a security interest will be transferred by the bureau of motor vehicles to any new certificate of title issued on a restored vehicle.⁴⁶

2. Assignment of Wages

The Indiana version of the Uniform Consumer Credit Code (UCCC) generally outlaws all assignments of wages, with one exception for revocable deductions permitted by law.⁴⁷ The 1975 General Assembly, in a bold anticonsumer measure, indirectly modified this Code provision by authorizing revocable deductions from wages for "deposit" or "credit" to an employee's account in payment to any person or organization "regulated" by the Indiana Uniform Consumer Credit Code.⁴⁸ The new statute requires the deduction authorization to be in writing, to indicate on its face that it is revocable at any time upon written notice to the employer, and to evidence agreement by the employer. This provision will seemingly permit zealous lenders to harass unsuspecting debtors with wage "deductions" without limitation on the "deduction" as to purpose or amount.⁴⁹ Because the new law permits a "deduction" only in favor of a poorly defined class of persons—those regulated under the UCCC—without regard to the type of transaction, the law runs the serious risk of being construed as special legislation.⁵⁰ Adoption of this type of law will certainly catch the eye of

⁴⁶*Id.*

⁴⁷*Id.* §§ 24-4.5-2-410, -3-403 (Burns 1974). The Indiana version is much broader than the official text of the UCCC which authorizes revocable assignment of wages. UNIFORM CONSUMER CREDIT CODE §§ 2.410, 3.403.

⁴⁸IND. CODE § 22-2-6-2(c) (10) (Burns Supp. 1975), *amending id.* § 22-2-6-2(c) (10) (Burns 1974). The provision replaced allowed a deduction of wages for payment directly to a bank or trust company for "deposit" to the employee's account.

⁴⁹If these deductions are made to secure consumer credit, they must be disclosed in accordance with requirements of the Federal Truth in Lending Act. 15 U.S.C. § 1681f (1970); Regulation Z, 12 C.F.R. § 226.8(a)(5) (1975). The 1975 Indiana amendment does not restrict deductions for deposit or credit to an employee's account for purposes of consumer credit or any particular type of account. IND. CODE § 22-2-6-2(c) (10) (Burns Supp. 1975).

⁵⁰"Regulated lenders" are described as those authorized to make or to take assignments of regulated loans. IND. CODE § 24-4.5-3-501(2) (Burns 1974). "Regulated loans" are consumer loans in excess of the 10 percent annual percentage rate. *Id.* § 24-4.5-3-501(1). A "regulated lender" in most cases is required to be licensed if it engages in the business of making consumer loans in excess of an annual percentage rate of 10 percent. *Id.* § 24-4.5-3-502.

consumer groups and thus furnish ammunition for further emasculation of one of the UCCC's chief purposes—to work out a fair balance between credit grantors and consumers.

3. Security Interests in Feedlot Operations

A farmer engaged in feedlot operations requires considerable capital. To obtain funds, he ordinarily must give a security interest in the animals to his supplier or to a lender furnishing funds for inventory and feed. Two recent decisions involve the rights of the supplier or lender who has perfected a security interest in livestock where the farmer-debtor disposed of the collateral.

In *United States v. Topeka Livestock Auction, Inc.*,⁵¹ the secured party recovered in conversion from an auctioneer through whom the debtor-farmer had made an unauthorized sale of cattle. The court applied section 9-307(1) of the Indiana Uniform Commercial Code (UCC), which provides that a buyer of farm products in the ordinary course of business from a farmer takes subject to the rights of a secured party, although a buyer of inventory in the regular course of business in other cases is protected.⁵²

In *Yeager & Sullivan, Inc. v. Farmers Bank*,⁵³ suppliers holding a perfected security interest in feeder pigs authorized the debtor to sell the pigs but attempted to protect themselves by instructing the markets through which the pigs were sold to make

Further, all persons, including unlicensed persons, making consumer credit sales, consumer leases, and consumer loans including consumer related credit sales and loans are subject to some regulation. *E.g.*, *id.* § 24-4.5-6-201 (dealing with persons required to pay fees for doing business).

The law also poses a serious risk to employers who have no means of knowing what assignees are eligible under the meaningless language of the new law. If deductions are paid to an unauthorized person, the employer may become liable to the employee for the improper deduction plus penalties for failure to pay wages in accordance with law. *Id.* §§ 22-5-5-1 to -3; *id.* §§ 22-2-4-1, -4 (Burns 1974).

⁵¹392 F. Supp. 944 (N.D. Ind. 1975). The court also held that a security agreement covering after-acquired farm animals was effective.

⁵²IND. CODE § 26-1-9-307(1) (Burns 1973); *accord*, *United States v. Pete Brown Enterprises, Inc.*, 328 F. Supp. 600 (N.D. Miss. 1971) (chickens); *Bank of Madison v. Tri-County Livestock Auction Co.*, 123 Ga. App. 768, 182 S.E.2d 687 (1971) (cattle); *Garden City Prod. Credit Ass'n v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971) (cattle). The secured party must file a financing statement, and since an agricultural product is involved, local filing under UCC section 9-401(1) (b) is required. *Swift & Co. v. Jamestown Nat'l Bank*, 426 F.2d 1099 (8th Cir. 1970). Since the secured party in *Topeka* was the Farmers Home Administration, an agency of the Federal Government, the court noted that it was uncertain whether state or federal law applied. The court, however, held that it would follow the UCC rule since the outcome would be the same no matter which law was applied. 392 F. Supp. at 948.

⁵³317 N.E.2d 792 (Ind. Ct. App. 1974).

all checks payable both to the secured parties and the debtor. The debtor thwarted the plan by forging the indorsements of the secured party to the checks given in payment for the pigs. In a suit by the secured parties against the collecting bank, which paid over the forged checks, the court denied relief to the extent that proceeds of the checks were used by the debtor to pay subfeeders to whom the pigs were bailed with the secured parties' knowledge.

The court volunteered that since the subfeeders held artisans' liens on the pigs sold,⁵⁴ which took priority over the previous security interests under the provisions of section 9-310⁵⁵ of the UCC,⁵⁶ the secured parties sustained no loss.⁵⁷ To this extent the proceeds went for the purpose the forged checks originally were intended. However, the evidence showed that the debtor returned the balance of the proceeds from the forged checks to his feeder business, which the court found was operated as a joint venture with the secured parties. The court determined that although this money went back into the feeder operations—thus apparently benefiting the secured parties both as holders of collateral and as joint venturers—the

⁵⁴The court pointed to two Code provisions allowing subfeeders an artisan's lien. IND. CODE §§ 32-8-29-1, -30-1 (Burns 1973).

⁵⁵IND. CODE § 26-1-9-310 (Burns 1974) provides:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

⁵⁶Indiana Code section 26-1-9-310 gives an artisan a super-priority over previous security interests only so long as he retains possession of the goods. Although the facts on this point are not clear from *Yeager*, it appears that the lien as well as its super-priority was lost when the subfeeders surrendered possession of the pigs, that is, the pigs were surrendered and sold before the subfeeders were paid. Surrender of possession by an artisan generally constitutes a surrender of his lien. *Vaught v. Knue*, 64 Ind. App. 467, 115 N.E. 108 (1917) (rule applied to statutory lien which was held to be declaratory of common law). An exception to the rule is recognized if possession is surrendered for a temporary purpose without intent to relinquish the lien. *Walls v. Long*, 2 Ind. App. 202, 28 N.E. 101 (1891). There was no discussion in *Yeager* of evidence which tended to show that the subfeeders preserved their liens when the goods were surrendered.

⁵⁷The owner of a negotiable instrument paid or transferred over an unauthorized indorsement cannot recover from the transferee or payor if the funds are applied to the purpose intended by the owner. *Shank v. Peoples State Bank*, 104 Ind. App. 443, 7 N.E.2d 46 (1937). In support of this rule, the *Yeager* court cited *Sharpe v. Graydon*, 99 Ind. 232 (1884), allowing a converter to set off from funds misappropriated the portion applied to the payment of the owner's debt owing to a third person. *Accord*, *Smith v. Downing*, 6 Ind. 374 (1855). The *Smith* court held that the fact that the plaintiff got the converted corn back would not defeat the action; it would be relevant for purposes of mitigation of damages.

collecting bank would have to pay the secured party to the extent that the proceeds were not used to pay debts intended to be satisfied by the improperly transferred checks.⁵⁸

These two cases point up the difficulties of financing feedlot operations. If the secured party allows the debtor to sell the animals, he runs the risk that the debtor will improperly dispose of the proceeds. The *Topeka* decision teaches that if the secured party does not authorize the debtor to dispose of the animals, the secured party need not worry that buyers in the ordinary course of the debtor's business will prevail, since buyers of farm products from farmers are excepted from protection under section 9-307(1) of the UCC. Nonetheless, the *Yeager* court recognized that sub-feeders will obtain a super-priority over previous security interests in feedlot animals to the extent that they acquire artisans' liens for feed and care of livestock—a priority expressly granted by section 9-310 of the UCC.

Expanding litigation in this area further indicates that feedlot operators must be given some authority to sell feeder animals as a means of keeping the business going. Stock buyers may and should become wary of dealing with feedlot operators. Decisions, therefore, often find implied or apparent authority from the secured party to sell the stock, so that buyers from the feedlot

⁵⁸It seems that the court relied upon the old rule that a converter misapplying funds to an obligation of the owner cannot set off the obligation against the conversion action. This rule was spawned in the era preceding new Indiana Trial Rule 13, at a time when counterclaim and setoff were severely limited. *Cf. Vancleave v. Beach*, 110 Ind. 269, 11 N.E. 228 (1886) (converter of negotiable instrument owned by plaintiff not allowed to set off obligation of plaintiff owing to converter). The *Yeager* court also neglected to analyze UCC section 3-419(3) which was intended to allow a representative of the collecting bank to avoid liability to the owner whose name was forged when collected funds are paid out over an unauthorized signature in good faith and in accordance with reasonable commercial standards. *Berkheimers, Inc. v. Citizens Valley Bank*, 529 P.2d 903 (Ore. 1974) (collecting bank paying over signature of one of conjunctive payees did not pay in good faith). Under UCC section 3-419(3), the collecting bank could not escape ultimate liability to the payor bank on its warranties, if they existed. *See First Nat'l Bank v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226 (Ky. 1974); UNIFORM COMMERCIAL CODE § 4-207. Finally, the *Yeager* decision dealt with checks seemingly payable to the joint venture enterprise, since the payees were not named either conjunctively or disjunctively, so that apparent authority existed in the debtor carrying on the business to indorse the instruments. *See Sondheim v. Gilbert*, 117 Ind. 71, 18 N.E. 687 (1888) (partner authorized to issue paper in firm name); *O'Hara v. Architects Hartung & Ass'n*, 326 N.E.2d 283, 286 (Ind. Ct. App. 1975) ("as to third parties, each joint adventurer is the agent of the others for all acts within the scope of the enterprise.").

operator are protected.⁵⁹ *Yeager* demonstrates that the secured party may permit the feeder to dispose of the collateral and at the same time obtain protection by requiring purchasers to make checks payable to both parties. But the case probably goes too far when the secured party wearing two hats, one as the holder of security and the other as joint venturer, was allowed to claim that his indorsement on the checks was unauthorized, thereby throwing the loss on an innocent collecting bank—this is especially true in this case since the funds were returned to the joint venture business.

4. *Special Assessment Liens*

The Indiana statutes contain numerous provisions for liens to secure payment of special assessment taxes. The time at which and the circumstances under which each of these liens attaches can be determined only by consulting separately each statute involved. In an attempt to simplify the search for these special assessment liens, the General Assembly recently amended certain statutory provisions to require the recording of liens for sewer charges and fees before they will attach to property.⁶⁰ The lien for such charges or fees attaches only at the time the notice of lien is filed with the county recorder and takes priority over all liens except other tax liens.⁶¹ Thus, this lien is not enforceable against a purchaser unless it is recorded prior to the time the property is conveyed to the purchaser. This amendment also contains provisions for the mandatory release of unrecorded assessment liens existing prior to the conveyance of the property to which they attach but recorded subsequent to such conveyance.⁶²

5. *Barrett Bonds*

The so-called Barrett Acts⁶³ permit special assessments to be financed with bonds secured by liens upon the property benefited by the assessments. Taxpayers owning the assessed land may pay

⁵⁹See *In re Caldwell Martin Meat Co.*, 10 UCC REP. SERV. 710 (E.D. Cal. 1970) (secured party waived required consent to sale); *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973) (sale of cattle authorized by course of dealing); *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967) (by consenting, secured party waived prohibition in security agreement); *Central Washington Prod. Credit Ass'n v. Baker*, 11 Wash. App. 17, 521 P.2d 226 (1974) (oral consent to sale of cattle allowed although written consent required of secured party by security agreement). *But cf.* *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 226 Ore. 643, 513 P.2d 1129 (1973).

⁶⁰IND. CODE §§ 19-2-5-23, -24 (Burns Supp. 1975).

⁶¹*Id.* § 19-2-5-23.

⁶²*Id.* See also *id.* § 19-2-5-24.

⁶³*Id.* §§ 18-6-5-1 to -30 (Burns 1974).

the liens in required installments. These Barrett bonds cause a great deal of confusion not only from the difficulty of ascertaining the existence of the lien but also from the many problems which arise when the assessed property owner fails to pay the required installments.

The recent case of *City of Hammond v. Beiriger*⁶⁴ illustrates the problems faced by Barrett bondholders, who must enforce delinquent installment payments against the owners by foreclosure and also pursue other remedies against the municipality when it does not pay collected installments to the holders of the bonds. In *Beiriger*, when the bondholder presented his bonds for payment, the city treasurer dishonored the bonds after asserting that tax funds allocable to the bonds had not been received. The bondholder sued the city when it later failed to redeem the bonds and after it had collected substantial assessments from property owners. Both at trial and upon appeal, the city asserted that the plaintiff's action against the city was barred by a prior foreclosure action against property owners who failed to make required payments on the bonds. The Third District Court of Appeals, in affirming the trial court decision, held that a judgment of foreclosure against the assessed property owners did not bar the right of the bondholder to recover payments collected by the municipality.⁶⁵

As an interesting sidelight of the case, which may be symptomatic of Barrett bond litigation, the court below withheld judgment for twelve years. Because of lack of objection, this flagrant delay was not allowed to affect the decision, but presumably it will attract the attention of disciplinary authorities.⁶⁶

C. Creditors' Rights and Involuntary Liens

1. Attachment and Garnishment

In Indiana a creditor by statute can procure attachment and garnishment at the threshold of a lawsuit.⁶⁷ Along with a bond the creditor must submit to the clerk of the court an affidavit

⁶⁴328 N.E.2d 466 (Ind. Ct. App. 1975).

⁶⁵The city records indicated that the city collected approximately 80 percent of the installments. *Id.* at 468.

⁶⁶Since neither of the parties objected to the delay, the court appeared to be content to overlook it. Let it be known that this writer objects, and all citizens should become suspicious of justice when entry of a judgment is delayed 12 years.

⁶⁷IND. CODE §§ 34-1-11-1 to -21 (Burns 1973). The attachment statute was broadened in its scope and further regulated by Trial Rule 64(B).

showing the presence of a proper ground for this relief.⁶⁸ A proper ground exists only where the defendant is a nonresident, is concealing his person, or is fraudulently concealing or disposing of his property. Upon such a showing, the clerk will issue the attachment writ to the sheriff or the appropriate summons to the garnishee. Thus, neither notice nor hearing is afforded the debtor before either his property is seized in attachment or before assets owned by him or owed to him by a third party are frozen in the hands of a third party through garnishment.⁶⁹ Ultimately, the defendant may post a counterbond and obtain a release of his property.⁷⁰

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,⁷¹ the United States Supreme Court held unconstitutional a similar garnishment statute in Georgia as denying due process. The Georgia statute provided that a plaintiff seeking garnishment need only post a bond and make an affidavit before some officer authorized to issue an attachment.⁷² The only substantial difference between the Indiana and Georgia statutes is that Indiana, as discussed above, allows prejudgment garnishment (or attachment) only upon certain grounds.⁷³ In Georgia, garnishment was permitted in the case of pending actions without such limitations.⁷⁴ Therefore, many of the characteristics which the Supreme Court found objectionable in the Georgia statute also appear in the Indiana statute. The clerk in Indiana issues the writ of attachment or garnishment

⁶⁸IND. CODE §§ 34-1-11-4(a) to -6 (Burns 1973). The affidavit and bond required in garnishment are set forth in section 34-1-11-20. Although attachment and garnishment are separately dealt with by the Indiana law, the plaintiff in garnishment proceedings must file an affidavit in attachment showing grounds for attachment. *Id.* § 34-1-11-4(a). The grounds for attachment or attachment and garnishment must ultimately be proved at trial. *Pomerooy v. Beach*, 149 Ind. 511, 49 N.E. 370 (1898).

⁶⁹IND. CODE §§ 34-1-11-9, -10, -21 (Burns 1973). For the method of attaching an interest in realty see Trial Rule 64(B)(6). The attachment lien on realty is invalid against subsequent bona fide purchasers unless notice is recorded in the *lis pendens* record. IND. CODE § 34-1-4-3 (Burns 1973).

⁷⁰The defendant may obtain the property by either posting a delivery bond (which is conditioned upon a return of the property attached) or a restitution bond (which is conditioned upon payment of the judgment and subsequent dissolution of the lien on the property). IND. CODE §§ 34-1-11-13, -17, -33 (Burns 1973).

⁷¹419 U.S. 601 (1975).

⁷²GA. CODE ANN. § 46-102 (1965).

⁷³IND. CODE § 34-1-11-1 (Burns 1973).

⁷⁴GA. CODE ANN. §§ 46-101 to -103 (1965). The defendant could defeat the attachment by posting a counterbond. *Id.* § 46-402.

without the participation of the judge.⁷⁵ The writ or process can issue upon an affidavit⁷⁶ which may be upon the belief of the affiant.⁷⁷ Except for court action upon a counterbond filed by the defendant,⁷⁸ no provision exists, either before the writ or process is issued or promptly thereafter, for notice to the defendant and for a hearing upon the merits of the plaintiff's claim or upon his right to attachment.

It is imperative, therefore, that the Indiana legislature by statute or the Indiana Supreme Court by rule correct the defects which make the Indiana attachment and garnishment statute vulnerable to constitutional attack. The following specific changes should be made. The affidavit for attachment and garnishment must be based upon personal knowledge and reliable testimony or documentation. A judge must approve the posting of the bond and the issuance of the writ or process. The defendant must receive prompt notice of the action, and a prompt hearing must be set. Moreover, the court must be convinced at the hearing that the plaintiff has made a showing of probable recovery both upon his claim and upon the grounds for attachment and garnishment.⁷⁹ However, existing procedures permit astute litigants a means for making constitutional use of the Indiana statute. A creditor seeking attachment or attachment and garnishment under the present Indiana laws along with his complaint may apply to the court for a special order under Trial Rule 4.14, which allows the court to make an appropriate order for notice of a prompt hearing.⁸⁰ After notice to the principal defendant, a hearing should be ordered to determine the plaintiff's probability of success in establishing grounds for attachment and recovery upon his claim. An order of attachment or attachment and garnishment on a finding

⁷⁵IND. CODE § 34-1-11-6 (Burns 1973). Although the bond is to be approved by the clerk, *id.* §§ 34-1-11-5, -20, the amount of the bond is to be fixed by the court. *Id.* § 34-2-33-1.

⁷⁶*Id.* §§ 34-1-11-4(a), -20.

⁷⁷*Champ v. Kendrick*, 130 Ind. 549, 30 N.E. 787 (1892). *See* IND. CODE §§ 34-1-11-9, -10, -21 (Burns 1973).

⁷⁸IND. CODE §§ 34-1-11-13, -17, -33 (Burns 1973).

⁷⁹In other words, the procedure should substantially follow those adopted in compliance with the now famous case of *Fuentes v. Shevin*, 407 U.S. 600 (1974). The *Fuentes* doctrine was held inapplicable to the acquisition of an artisan's lien. *Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974).

⁸⁰The United States Supreme Court made the point in *Di-Chem* that there "is no provision for an *early* hearing." 419 U.S. at 607 (emphasis added). In the case of a temporary restraining order, due process seems to be satisfied by the requirement of a prompt hearing. Thus, Indiana Trial Rule 65(B) dissolves a temporary restraining order after 10 days or as extended for cause as required, and requires prompt hearing on the preliminary injunction. The Indiana provision follows the federal rule on this point. *Carroll v. President & Comm'rs*, 393 U.S. 175 (1968).

of probable cause should satisfy the due process requirements imposed by the *Di-Chem* case.⁸¹

The Indiana Uniform Consumer Credit Code provides that an employee cannot be discharged because his wages are subject to one or more garnishments.⁸² In this respect, the law gives greater protection than the Federal Truth in Lending Act, which prohibits discharge because of garnishment of wages "for any one indebtedness."⁸³ The Seventh Circuit Court of Appeals in *Brennan v. Kroger Co.*⁸⁴ interpreted the federal provision as protecting an employee even though two creditors obtained successive garnishments against his wages. Following an earlier interpretation of "garnishment" by the Department of Labor, the court held that a garnishment of wages occurred only when the employer was required to withhold compensation.⁸⁵ Hence, the court determined that a second creditor, who procured a later garnishment and thus enjoyed no right to payments until the first lien was satisfied, had not subjected the employee's wages to garnishment. The employer, therefore, erred in discharging the employee because of more than one garnishment of his wages. Although the court recognized the employer's obligation to honor the second garnishment after the first was satisfied, this inconvenience constituted an improper basis for discharge. Thus, where the employee has suffered two garnishments against his wages, he may now call upon the Secretary of Labor to enforce his rights in the federal courts⁸⁶ or, if he wishes, seek relief under Indiana law.⁸⁷

⁸¹See *In re Oronoka*, 393 F. Supp. 1311 (N.D. Me. 1975); *McIntyre v. Associates Financial Serv. Co.*, 328 N.E.2d 492 (Mass. 1975) (court refused to apply the *Di-Chem* decision retroactively to pending or prior attachment proceedings).

⁸²IND. CODE § 24-4.5-5-106 (Burns 1974).

⁸³15 U.S.C. § 1674 (1970). The federal law expressly preserves state laws giving greater protection to an employee. *Id.* § 1677.

⁸⁴513 F.2d 961 (7th Cir. 1975).

⁸⁵Wage-Hour Administrator Opinion Letter No. 1136 (WH-89) (Oct. 26, 1970), [1969-1973 Transfer Binder] CCH LAB. L. REP. ¶ 30,703, at 42,121. The court pointed out, however, that the interpretation made 29 months after the enactment of the statute was not contemporaneous with the passage of the law.

⁸⁶The Federal Truth in Lending Act provides no remedy for an injured employee, but it does provide that a willful violation of the law carries a \$1,000 fine and/or imprisonment of not more than 1 year. 15 U.S.C. § 1674(b) (1970). The Secretary of Labor has power to enforce this Act. *Id.* § 1676. Compare, *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974) (private remedy implied).

⁸⁷Under the Indiana Uniform Consumer Credit Code the employee may seek an order requiring reinstatement and recover wages lost as a result of discharge not to exceed 6 weeks wages. IND. CODE § 24-4.5-5-202(6) (Burns 1974). It should be noted that two garnishments may be permitted where, for example, no exemption is provided against one or both of two garnishees.

2. Receiverships

In Indiana a contract creditor may by statute obtain the appointment of a receiver over a corporation upon proof of equitable grounds, usually arising because of corporate insolvency.⁸⁸ The statute also allows for the appointment of receiver without notice for "sufficient cause shown by affidavit."⁸⁹ In *Environmental Control Systems, Inc. v. Allison*,⁹⁰ the Indiana Supreme Court once again made it clear that the affidavit required to justify the appointment of a receiver without notice must contain specific facts, other than those upon information and belief. Lawyers should take time to learn from this case a fundamental lesson in the use of court affidavits. A good affidavit should contain competent testimony based upon either the affiant's personal knowledge of the facts or upon authenticated documentation which would be admissible in court over objection. The testimony or documentation should suffice to make a *prima facie* case upon the issues to be established.⁹¹

This could occur where garnishment of wages subject to exemptions is first allowed in favor of C1. Later a support order is issued and wages are garnished for enforcement of the support order in favor of C2. It appears that no exemption is allowed in the case of support orders. See 15 U.S.C. § 1674 (1970); IND. CODE § 24-4.5-5-105(2) (Burns 1974). However, the Indiana Supreme Court has indicated that debtors are entitled to the best of all exemptions, and since 90 percent of wages are exempt in the case of all orders in proceedings supplemental, it seems that this exemption applies to all claims including claims for support. Compare *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974), with IND. CODE § 34-1-44-7 (Burns 1973) and *Guard v. Guard*, 116 Ind. App. 396, 64 N.E.2d 802 (1946) (holding that only 10 percent of wages are subject to a proceedings supplemental order for support).

⁸⁸IND. CODE § 34-1-12-1 (Burns 1973). See also *South Side Motor Coach Corp. v. McFarland*, 207 Ind. 301, 191 N.E. 147 (1934). A receiver ordinarily will not be appointed on behalf of a tort creditor holding a contingent claim which has not been reduced to judgment. *Royal Academy of Beauty Culture, Inc. v. Wallace*, 226 Ind. 383, 78 N.E.2d 32 (1948). The recent decision of *Puzich v. Pappas*, 314 N.E.2d 795 (Ind. Ct. App. 1974), also recognizes that disputing partners may seek the appointment of a receiver in proceedings for an accounting and dissolution of the partnership.

⁸⁹IND. CODE § 34-1-12-9 (Burns 1973).

⁹⁰314 N.E.2d 820 (Ind. Ct. App. 1974). *Accord*, *Inter-City Contractors Serv., Inc. v. Jolley*, 257 Ind. 593, 277 N.E.2d 158 (1972).

⁹¹Under Trial Rule 56(E) affidavits used to justify or oppose summary judgment must show the competency of the witness along with facts based upon the affiant's personal knowledge. *Renn v. Davidson's Southport Lumber Co.*, 300 N.E.2d 682 (Ind. Ct. App. 1973). When the issues depend upon proof of a written instrument, it should be presented with authenticating affidavits. *Dallas Co. v. William Tobias Studio, Inc.*, 318 N.E.2d 568 (Ind. Ct. App. 1974).

Although not raised in the *Allison* case, it is now established that notice to the defendant and a hearing on the justification for appointing a receiver must follow promptly the appointment of a receiver without notice. Specific findings by the court upon the issues probably must follow the hearing.⁹² Appointment of a receiver, with or without notice, can result in serious damage to the defendant. Action of the court upon the receivership petition should, therefore, follow substantial safeguards of fair play. These safeguards might be construed to require the furnishing of security.⁹³

3. Bankruptcy

As a general rule the bankruptcy court has no summary jurisdiction over property in the possession of a third party who has a substantial claim to it at the time of the filing of the bankruptcy petition.⁹⁴ The United States Supreme Court, in upholding the Seventh Circuit Court of Appeals,⁹⁵ applied this general rule in *Phelps v. United States*⁹⁶ to the Internal Revenue Service (IRS). The IRS served a levy for the enforcement of a prior lien for taxes upon a common law assignee for the benefit of creditors to whom the bankrupt had made an assignment. The Court held that the assignee, who had received notice of the levy prior to the assignor's bankruptcy, held constructive possession of the debtor's

⁹²*Indianapolis Mach. Co. v. Curd*, 247 Ind. 657, 221 N.E.2d 340 (1966). The court is required to make specific findings where it grants or refuses preliminary injunctions. Since the appointment of a receiver involves injunctive relief, it can be argued that the court should make findings of fact when a receiver is appointed prior to resolution of a creditor's claim which has not been reduced to judgment. IND. R. TR. P. 65(D).

⁹³In *Allison* the trial court required a bond, but the record did not disclose whether the bond was posted. Security should be considered as a requirement for the appointment of a receiver without notice. *Indianapolis Mach. Co. v. Curd*, 247 Ind. 657, 221 N.E.2d 340 (1966). Appointment of a receiver without notice and hearing may pose a due process question even if security is furnished. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment without notice and hearing held in violation of due process). This case is discussed in section *M supra*.

⁹⁴The leading decision on this general problem is *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426 (1924). Summary jurisdiction to settle disputes with respect to property in the possession of third parties with bona fide claims is granted the bankruptcy court in some special situations. Bankruptcy Act § 67a(1), 11 U.S.C. § 107a (1970) (avoidance of liens obtained by judicial proceedings). Summary jurisdiction is granted to the bankruptcy court over assets of the bankrupt which are transferred within four months of the petition and are held by a general receiver or an assignee for the benefit of creditors. *Id.* §§ 2(21), 70a(8), 11 U.S.C. §§ 11(21), 110a(8) (1970).

⁹⁵*United States v. Phelps*, 495 F.2d 1283 (7th Cir. 1974).

⁹⁶421 U.S. 330 (1975).

assets. Thus the bankruptcy court was denied summary power to adjudicate the question of the Government's title. This rule also applies in favor of an assignee of accounts where he has properly notified the account debtor to pay him, but the assignee may lack constructive possession until notification to the account debtor.⁹⁷ It should be noted that in *Phelps* the assignee was not a judicial officer.⁹⁸ Had the assignment been made under a judicial type of liquidation, as provided in Indiana,⁹⁹ it appears that the IRS could not have levied upon the assets after they passed to the liquidator.¹⁰⁰ Hence, where bankruptcy follows a receivership or judicial type of assignment for the benefit of creditors, the bankruptcy court, as successor of the statutory judicial liquidation, should retain summary jurisdiction over claims to the property.

4. Artisans' Liens

The common law recognized the right of a repairman to retain possession of the goods delivered to him for repairs until he was paid for his work and materials. Numerous Indiana statutes extend, but do not necessarily supersede, this common law lien. The statutes apply to various trades. They usually permit the artisan to dispose of the goods, sometimes after public notice and sometimes after notice to the owner, and in some cases they allow foreclosure by court action.¹⁰¹

⁹⁷The United States Supreme Court in *Phelps* disapproved an earlier decision by the Ninth Circuit Court of Appeals, *In re United Gen. Wood Prod. Corp.*, 483 F.2d 997 (9th Cir. 1973), that an assignee of accounts, in this case proceeds of accounts held by a factor, did not have constructive possession of the accounts or the proceeds thereof after the account debtor (the factor) had been notified by the debtor to pay the assignee. 421 U.S. at 333. The *Phelps* Court upheld summary jurisdiction of the bankruptcy court to settle rights of the IRS which had levied upon and served notice of the levy upon the account debtor before bankruptcy. *Id.* at 373. Inasmuch as the account debtor had been notified in that case, the question remains open whether an assignee of accounts has constructive possession unless and until he notifies the account debtor as permitted by UCC sections 9-502(1) and 9-318(3).

⁹⁸An assignee for the benefit of creditors in Illinois is not a judicial officer. *In re Western Marine & Fire Ins. Co.*, 38 Ill. 289 (1865).

⁹⁹IND. CODE §§ 32-12-1-1 to -21 (Burns 1973).

¹⁰⁰See INT. REV. CODE OF 1954, § 6871; Treas. Reg. § 301.6871(a)-2 (1974) (providing in effect that assets under the control of a court, particularly a receivership, may not be subjected to a levy for taxes).

¹⁰¹The statutory liens in favor of particular artisans do not supersede their common law liens. *Grusin v. Stutz Motor Car Co.*, 206 Ind. 296, 187 N.E. 382 (1933). *But cf.* *Nicholas v. Baldwin Piano Co.*, 71 Ind. App. 209, 123 N.E. 226 (1919) (holding that statute authorizing innkeeper's lien superseded common law lien, which took priority over prior interests held by third parties in guest's goods subject to lien).

The 1975 General Assembly reaffirmed the lien in favor of another special interest group, those “engaged in the business of altering or repairing electronic home entertainment equipment.”¹⁰² This new law simply gives this group an artisan’s possessory lien¹⁰³ upon the described equipment with a power to sell at auction after receipt of notice by certified mail, return receipt requested, to the owner and any secured party who has perfected by filing.¹⁰⁴ However, it uniquely requires judicial foreclosure if the owner, upon receipt of the notice of sale, informs the lienholder in writing of objections regarding either the quality of the workmanship or an alleged overcharge.¹⁰⁵ Since another existing statute is sufficiently broad to give electronic home entertainment equipment repairmen a possessory lien upon the items repaired,¹⁰⁶ this new statute is of little importance unless it is construed to limit the rights and remedies applicable to this special group of lienholders.

Two cases have recently reviewed Indiana artisans’ lien laws.¹⁰⁷

¹⁰²IND. CODE § 32-8-36-1 (Burns Supp. 1975).

¹⁰³*Id.* §§ 32-8-36-1, -2. Although the statute generally gives the repairman of electronic home entertainment equipment a lien, section 32-8-36-2 allows him to sell the equipment if it “is still in his possession,” thus indicating that the lien depends upon the repairman’s possession. It is doubtful that the statute allows the repairman a lien upon such equipment repaired in the home because he does not acquire “possession” of it, but this certainly will pose a serious problem.

¹⁰⁴*Id.* §§ 32-8-36-2, -3.

¹⁰⁵*Id.* § 32-8-36-3. Notice of sale is not required to be given to the “owner,” but the owner and any “prior lienholders” are entitled to any amount in excess of the lien.

¹⁰⁶*Id.* §§ 32-8-30-1 to -3 (Burns 1973). The statutes apply to “any article of value” entrusted to the artisan and provide for sale at public auction.

¹⁰⁷The Indiana Code gives a lien to a person engaged in repairing, storing, servicing, or furnishing supplies or accessories for motor vehicles, airplanes, construction machinery and equipment, and farm machinery. *Id.* § 32-8-31-1 (Burns 1973). This statute says nothing about “possession” of the repairman as the basis for the lien, but the lien given by this statute expires within 60 days after performance unless notice of intent to hold the lien is recorded with the county recorder as in the case of recording mechanics’ liens. *Charlie Eidson’s Paint & Body Shop v. Commercial Credit Plan, Inc.*, 146 Ind. App. 209, 253 N.E.2d 717 (1969) (lien filed against automobile after a 60-day period as to repairs invalid, but valid as to storage where filed within 60-day period from time of storage).

The Code also authorizes a lien to persons engaged “in the business of storing, furnishing supplies for or repairing motor vehicles, motor bicycles, or motor trucks.” IND. CODE § 9-9-5-6 (Burns 1973). This lien must be entered in a book showing the names and addresses of the owners, the license numbers of the vehicle, and the date of possession. Indiana also recognizes a common law artisan’s lien. *Id.* §§ 32-12-1-1 to -21 (Burns 1973). Another statute is sufficiently broad—in favor of any “mechanic or tradesman”—to

In *Phillips v. Money*¹⁰⁸ the Seventh Circuit concluded that detention pursuant to a common law or statutory mechanic's lien by a private individual in possession of a motor vehicle does not constitute "state action." The owner had claimed that artisans' liens were unconstitutional under the tenuous theory that the states could not permit an artisan's lien without prior notice and judicial hearing in accordance with the doctrine of *Fuentes v. Shevin*.¹⁰⁹ The *Fuentes* case required notice and hearing before a plaintiff in a replevin action could regain possession at the threshold of the lawsuit. Replevin involves affirmative state ministerial action through the officers of a court. It thus differs significantly from the self-help rights granted by state law to an artisan in peaceful possession of goods.

An artisan's lien was also involved in *Yeager & Sullivan, Inc. v. Farmers Bank*,¹¹⁰ where the court recognized that pig feeders retained a statutory artisan's lien giving them a "super-priority" under section 9-310 of the UCC over previously perfected security interests.¹¹¹

5. Mechanics' Liens

Two recent decisions reiterated the rule that a mortgagor, conditional vendee, tenant, or co-owner cannot by contracting for improvements give a mechanic priority over the superior interests of others in the land. Both cases, though, recognized an important exception where the holder of the superior interest actively consents to the improvements. In *Dallas Co. v. William Tobias Studio, Inc.*,¹¹² the mechanic claimed that the defendants, the lessor, and allow a possessory artisan's lien in favor of a motor vehicle repairman. *Id.* §§ 32-8-30-1, -2. Under this act the lienholder is not required to record his lien or keep an entry book.

¹⁰⁸503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

¹⁰⁹407 U.S. 67 (1972). This case appears to have been substantially overruled by *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), where the plaintiff was allowed to repossess goods under a replevin suit without notice and hearing since the order was made by a judicial officer. The great weight of the many decisions on this problem hold that *Fuentes* is inapplicable to state laws allowing self-help, possessory liens, and the like, without judicial or other action by state officials. *See, e.g.*, *Parks v. "Mr. Ford,"* 386 F. Supp. 1251 (E.D. Pa. 1975) (artisan's lien); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (statute allowing mechanic's lien upon real property held constitutional although no notice and hearing provided before lien attached). For cases invalidating state artisan lien laws see Annot., 64 A.L.R.3d 814 (1975).

¹¹⁰317 N.E.2d 792 (Ind. Ct. App. 1974).

¹¹¹The court cited two artisans' lien statutes as protecting the pig feeders. IND. CODE §§ 32-8-29-1, & 32-8-30-1 to -30-8 (Burns 1973). An extended discussion of the *Yeager* decision may be found in section B *supra*.

¹¹²318 N.E.2d 568 (Ind. Ct. App. 1974).

those claiming through the lessor, consented to improvements on the land contracted for by the tenant. The defendants answered that the mechanic had contracted with the tenant without their knowledge or consent. The trial court granted the defendants' motion for summary judgment. The appellate court remanded the case upon finding sufficient evidence from testimony and the terms of the lease to show the defendants' active consent in making the improvements. The active consent bound the landlords, their vendees, and a mortgagee of the vendees.¹¹³

In *O'Hara v. Architects Hartung & Association*,¹¹⁴ defendant O'Hara authorized an architect to prepare plans for an apartment to be built on land sold to the defendant Wickes. Wickes paid part of the architect's fees. Although the apartment was never built, the court held that the architect could foreclose a lien on defendant Wickes' land for the balance of his fees. The court found evidence which would support the finding of a joint venture between O'Hara and Wickes, but it based its decision upon a determination that Wickes' partial payment constituted sufficient active consent to support a mechanic's lien.

Title lawyers should be alerted to the fact, as illustrated by *O'Hara*, that a mechanic's lien relates "to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery."¹¹⁵ Hence, an architect's lien may not appear for months or years either in the records or through notice imparted from actual physical construction. *O'Hara*, therefore, is of dubious precedent as against bona fide purchasers of real estate before either construction is commenced or notice of the architect's mechanic's lien is recorded.¹¹⁶

¹¹³Although the sequence of ownership did not clearly appear from the facts, it seems that if the evidence established that the tenant's improvements were made with the active assent of his landlord, the subsequent vendees of the landlord and their mortgagee would be bound by the lien incurred by the tenant. This result is supported by Indiana Code section 32-8-3-5, which provides that the lien relates back to the time the work of the mechanic commenced. Hence the court of appeals could have granted partial summary judgment against the landlord's vendees and the vendees' mortgagee, conditioned upon proof that the landlord was bound by active assent. *Cf. Mark v. Murphy*, 76 Ind. 534 (1881).

¹¹⁴326 N.E.2d 283 (Ind. Ct. App. 1975). Special legislation gives architects, engineers, and surveyors rights to a mechanic's lien. *See, e.g., IND. CODE* § 32-8-25-1 (Burns 1973).

¹¹⁵IND. CODE § 32-8-3-5 (Burns 1973).

¹¹⁶Thus, if *O* contracts with a mechanic for improvements and work is commenced on June 1, and *O* sells or mortgages the property on June 2, the mechanic will take priority over *O*'s vendee or mortgagee even if his mechanic's lien is recorded after the vendee or mortgagee perfects. *Mark v. Murphy*, 76 Ind. 534 (1881); *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896). *O*'s vendee or mortgagee has some kind of notice from the commencement of

Under the Indiana mechanics' lien statutes, notice of a mechanic's lien must be recorded within 60 days. This requirement traditionally has been construed as requiring recordation within 60 days after the mechanic last furnishes work, labor, or machinery for which the lien is claimed to the owner or contractor.¹¹⁷ When the owner calls back the mechanic to make corrective work, the time period for recordation commences from the point at which the mechanic completes the corrective work.¹¹⁸ Additional performance added under a new or separate contract does not extend the time period for work done under the old contract.¹¹⁹

*Potter v. Cline*¹²⁰ reaffirmed these principles. The contractor had completed initial "rough in" work under one of several electrical contracts with the defendant corporation, but he had not finished the job because the corporation had delayed 9 months in having certain necessary devices installed. When the defendant finally called the contractor back to work, his workmen were committed to other projects. The parties agreed, therefore, that the contractor would deliver to the defendant the remainder of the materials in his possession to enable another contractor to finish the job. Following the delivery, the plaintiff-contractor filed notice of a mechanic's lien for all the labor and materials supplied under the various contracts. In a suit to foreclose these liens, the court held that, while the time for filing his liens had expired as to the previous contracts, the filing period for the last contract commenced after the materials ultimately were furnished. This case stands as a warning to mechanics where their work with an owner or prime contractor is spread out over a period of the time under different or separate contracts. The time for recordation relates to the time of completion as to each job. But when completion is delayed on a single contract and continued with

the construction. But if the mere contracting with an architect is the key point at which the lien attaches, subsequent vendees and purchasers of O have no means of learning of the architect's lien.

¹¹⁷IND. CODE § 32-8-3-3 (Burns 1973); *Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973).

¹¹⁸Where defective work of the mechanic is corrected at the request of the owner, the time for recordation commences from the time the corrective work is completed. *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896). The contractor cannot extend the time of recordation by voluntarily correcting defects. *Ellis v. Auch*, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

¹¹⁹*Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973), holds that recordation of a single notice as to two separate contracts, one with the owner and one with the prime contractor, was proper, but the time for recordation was computed separately from the time of completion as to each contract.

¹²⁰316 N.E.2d 422 (Ind. Ct. App. 1974).

the owner's assent or approval, the time for recordation relates to the time when the continued performance is finished.¹²¹

Potter also followed the established rule that the holder of any interest in or claim to land including a mere possessor or a purchaser under a conditional sales contract may bind his interest in land to a mechanic's lien¹²² and that his interest in the land may be sold on foreclosure of the lien.¹²³ Although not raised in *Potter*, an interesting and important issue was raised by the position taken by the conditional purchaser that only a "freehold" interest may be foreclosed and the equally untenable position of the dissent that only a defined "lienable title" may be ordered sold.¹²⁴

Suppose that *D*, a stranger to *O* who is the absolute owner of vacant land, orders work or materials for the property from *M* without informing *M* that *D* owns no title or is unauthorized

¹²¹This does not mean that problems have been settled as to when performance upon a particular construction contract is completed. Completion date undoubtedly will remain a matter to be determined by the contract and the facts of each case. An unrevoked termination of the contract by the owner or prime contractor probably would determine the time of completion as to the mechanic. Suppose that after work is completed a subcontractor is directed to correct defective work by the prime contractor without the owner's assent? The time for recording notice of the lien is not extended as to the owner. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N.E. 583 (1903).

¹²²Although it is not clear from the *Potter* opinion, it appears that the defendant, against whom a mechanic's lien was asserted, admitted in its pleadings that it was a contract purchaser of a part of the land. There was also evidence that the defendant was in possession of the property. Answers to interrogatories established that the defendant was a contract purchaser, but these were not admitted into evidence. The court properly indicated that disciplinary action may be in order for attorneys representing a defendant who filed pleadings denying title, if in fact they were aware of the defendant's ownership.

¹²³A similar result to the effect that any interest in realty is subject to a mechanic's lien was reached in *Dallas Co. v. William Tobias Studio, Inc.*, 318 N.E.2d 568 (Ind. Ct. App. 1974). See also *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924) (reaching a similar result as to the interest of a lessee); *Kendall Lumber & Coal Co. v. Roman*, 120 Ind. App. 368, 91 N.E.2d 187 (1950) (interest of a conditional purchaser subject to a mechanic's lien and foreclosure); *Robertson v. Sertell*, 88 Ind. App. 591, 161 N.E. 669 (1923) (lessee's title prohibiting mechanic's lien not available to the lessee).

¹²⁴The dissent would have required proof of a "lienable title" in the fear that the decree would impair titles of those who were not made parties. This argument was adequately refuted by the majority's discussion of interests subject to a mechanic's lien, and even if not, it is unthinkable that the existence of a stranger's title should be litigated when he is not a party. The defendant worrying about the stranger's title should have vouched him in as a party. Compare IND. CODE § 26-1-3-306(d) (Burns 1974), which allows an obligor to set up claims of nonholders only when they defend the action except in cases of theft or inconsistency with a restrictive indorsement.

by *O* to procure the work. *M* duly records a mechanic's lien on the property. What are *M*'s rights as against *D*, assuming that he has none against *O*? *D*, of course, may be held for the price under his contract with *M*, but since *M* has no lien he cannot recover attorney's fees as allowed by the mechanics' lien statute.¹²⁵

Clearly if *D* is in possession or claims possession, which he certainly does as far as *M* is concerned, *D* has possessory title,¹²⁶ which should be sufficient to permit the mechanic's lien to attach and to be foreclosed for whatever that possessory right is worth.¹²⁷ But if *D*'s title is worthless, should not *D* be held to an implied warranty, either of title to the land or of authority to bind the owner, *O*? If so, what are *M*'s damages? It seems logical that *M* should be able to claim protection of an implied warranty of title unless he was informed of *O*'s rights; and if *D* purported to contract on behalf of *O* without authority, *M* should be protected by the implied warranty of authority to act as *O*'s agent. A vendor contracting to sell land is bound by an implied warranty of title,¹²⁸ and an agent purporting to act as such is bound by an implied warranty that he is authorized by his purported principal in the transaction.¹²⁹ Damages for breach of warranty in either case should put *M* in the same position he would have been in had the warranties been fulfilled, and this should include the right to

¹²⁵IND. CODE § 32-8-3-14 (Burns 1973). A mechanic may claim attorney's fees only for enforcement of his valid lien, and he has no right to attorney's fees to the extent of his recovery upon his contract with the owner. *Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974).

¹²⁶It is hornbook law that prior, continued possession is a sufficient title to support the common law remedies such as ejectment and trespass and proof thereof makes a prima facie case as against a wrongdoer. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236 (1879). Proof of title for almost all conceivable remedies in the great majority of cases is based upon prior possession or constructive possession linked to a prior possession. Constructive possession is established by

- (a) estoppel (as where a tenant is estopped to deny the title of his landlord at the end of the term),
- (b) the common source rule (i.e., parties claiming through a common source are not required or allowed to go beyond the common source in determining superiority of title and possession),
- (c) imputed possession (as where a grantee, devisee, heir, or other transferee or reversioner claiming from one in possession at the time of the transfer or reversion is deemed to continue in possession), or
- (d) color of title (as where a possessor in part of a tract of land under color of title to the whole is deemed to possess the whole).

¹²⁷*Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974) (possession sufficient title upon which a mechanic's lien could be based).

¹²⁸*Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N.E. 808 (1893).

¹²⁹In Indiana an agent acting without authority becomes a principal in the transaction. *Terwilliger v. Murphy*, 104 Ind. 32, 3 N.E. 404 (1885).

attorney's fees which would have been recoverable had the mechanic's lien been allowed to stand against O's good title.¹³⁰

6. *Fraudulent Conveyances*

Further development of the law giving rights to creditors against the supplier of a trade name when credit is advanced to the operator of a business carried on under the trade name¹³¹ was enunciated in *Sheraton Corp. of America v. Kingsford Packing Co.*¹³² In *Kingsford* the court permitted a meat supplier who advanced credit to a hotel to collect from the franchisor who managed the hotel for another owner but under the trade name of the franchisor. Since recovery was allowed on the basis of estoppel, the creditor could recover from the franchisor only upon proof that the franchisor created an appearance of authority in the franchisee and that the creditor advanced credit upon the representation without knowledge of the true facts. The appearance of authority was inferred from the terms of the franchise agreement requiring the franchisee to carry on its business under the trade name of the franchisor. Reliance was proved from billings submitted by the creditor over a period of time naming the franchisor as debtor.¹³³

In *Abrahamson v. Levin*¹³⁴ the Indiana Court of Appeals continued to countenance a form of corporate thievery¹³⁵ by permitting

¹³⁰*Compare* Teague v. Whaley, 20 Ind. App. 26, 30, 50 N.E. 41 (1898) (covenantor defending title allowed recovery of attorney's fees), *with* Detroit Fidelity & Sur. Co. v. Frey, 96 Ind. App. 696, 158 N.E. 910 (1927) (surety on contractor's bond liable for attorney's fees incurred by owner in defending action to foreclose mechanic's lien). Unlike common law restrictions upon express warranties of title recognized in real estate conveyances, the beneficiary of contract warranties is allowed damages measured by the loss of bargain. Foster v. Klinger, 92 Ind. App. 700, 175 N.E. 136 (1931); Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N.E. 808 (1893). Damages may be recovered for breach of the agent's implied warranty of authority. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 124(F), at 216 (1964).

¹³¹Creditors continuing to supply credit to the purchaser of a business who continued to operate under the seller's trade name were allowed to recover from the seller in Meggs v. Central Supply Co., 307 N.E.2d 288 (Ind. Ct. App. 1974), *discussed in* Townsend, *Secured Transactions and Creditors' Rights*, 1974 *Survey of Indiana Law*, 8 IND. L. REV. 234, 253 (1974).

¹³²319 N.E.2d 852 (Ind. Ct. App. 1974).

¹³³Failure of the franchisee to record its assumed name with the secretary of state was considered an important factor in charging the franchisor with fault. *See* IND. CODE §§ 23-15-1-1, -3 (Burns 1973).

¹³⁴319 N.E.2d 351 (Ind. Ct. App. 1975).

¹³⁵In the earlier case of Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375 (Ind. Ct. App. 1973), the court adopted a rule to the apparent effect that it is proper for a corporate president to steal small amounts—in this case to use corporate funds to pay his housekeeper.

an insolvent corporation to prefer corporate officers who were also general creditors of the corporation to the exclusion of other general creditors.¹³⁶ The holding in *Abrahamson* was based upon a long line of Indiana decisions rejecting the "trust fund"¹³⁷ theory of corporate responsibility. The court's position has no appeal to this writer. The legal recognition of the concept of good faith in all types of corporate business dealings is long overdue.¹³⁸

7. Miscellaneous

In an important decision, the United States District Court for the Northern District of Indiana in *Allen v. Beneficial Finance Co.*¹³⁹ found that the truth in lending disclosure statement used by a large finance company lacked meaningful sequence because information was interposed at random and in three or more columns.¹⁴⁰ The form set forth as an exhibit to the opinion amply supports the court's observation that the helter skelter information therein "effectively masks" information the Truth in Lending Act sought to make more available to the consumer.

Recent amendments to Regulation Z of the Federal Reserve Board exclude from the disclosure requirements of the Federal Truth in Lending Act all consumer credit transactions for agricultural purposes in excess of \$25,000, including transactions secured by interests in land.¹⁴¹ The 1975 Indiana General Assembly modi-

¹³⁶The creditors seeking to avoid the preference did not seek the appointment of a receiver, a factor which may have influenced the court in denying relief inasmuch as no forum for adjusting equities among all creditors was provided. A statute prohibiting preferences to directors who are sureties on obligations of the corporation was held inapplicable to corporate officers who were not directors and sureties. IND. CODE § 32-12-1-1 (Burns 1973), construed in *Travis v. Porter*, 86 Ind. App. 369, 158 N.E. 234 (1927). This statute has been held constitutional under an attack that since it was included in a statute relating to assignments for the benefit of creditors it violated the single subject requirement for legislation under the Indiana Constitution. *Vale v. Gary Nat'l Bank*, 406 F.2d 39 (7th Cir. 1969).

¹³⁷The "trust fund" theory of corporate preferences provides that the directors of a corporation hold corporate property in trust for the corporate creditors. See *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 159 Ind. 614, 64 N.E. 870 (1902); *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N.E. 329 (1912).

¹³⁸*Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 N.E.2d 154 (1968) (court repeats several times in opinion that corporate officers are bound to act in "good faith").

¹³⁹393 F. Supp. 1382 (N.D. Ind. 1975).

¹⁴⁰*Accord*, *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9 (D. Ore. 1975). The *Woods* Court reached the same conclusion as to a similar disclosure statement and also allowed recovery of the maximum penalty provided by statute.

¹⁴¹40 Fed. Reg. 30,085 (1975). Excluded also are non-real-estate credit transactions over \$25,000.

fied the disclosure provisions of the UCCC to bring it in line with the federal regulations on this point.¹⁴² Companion legislation to the UCCC defines the closing costs allowed as “additional charges” with respect to loans secured by an interest in land.¹⁴³ Permitted are fees for title examination, abstracts, title insurance, and surveys; charges for preparation of deeds and settlement statements; escrow deposits for payment of taxes, insurance, and land rents; and notary and appraisal fees subject to specified limitations.¹⁴⁴

Finally, in *Mishawaka Federal Savings & Loan Association v. Brademas*,¹⁴⁵ the court held that a mortgage created an easement, and when recorded the mortgage was effective to put subsequent purchasers on notice of the easement. The mortgage described the easement as a “right-of-way and easement for ingress and egress across that real estate paved with a blacktop pavement.”¹⁴⁶ The easement and the servient estate were described only by identification of a driveway as a monument with reference to the dominant estate.¹⁴⁷ The granting clause of the mortgage creating the easement in favor of the mortgagee purported to bind the owner of the servient estate in its own behalf and as a general partner of the mortgagor-owner of the dominant estate. The court held that the instrument was properly executed and acknowledged, and therefore legally recorded, although it was signed and acknowledged by the servient owner and two of its general partners who signed in that capacity. The case clearly establishes that a conveyance purporting to bind a partnership in the granting clause *prima facie* is properly executed and acknowledged if it is signed and acknowledged by a general partner so long as the capacity in which the partner signs is indicated.¹⁴⁸

¹⁴²IND. CODE § 24-4.5-3-301 (Burns Supp. 1975). Agricultural loans under \$25,000 remain subject to the other provisions of the UCCC except where specifically excluded. *Id.* §§ 24-4.5-2-104(c), -3-104(b) (Burns 1973).

¹⁴³*Id.* § 24-4.5-3-202(d) (Burns Supp. 1975). This provision follows closely the Federal Truth in Lending Act, which also allows such additional charges. 15 U.S.C. § 1605(e) (1970); Regulation Z, 12 C.F.R. § 226.4(2) (1975).

¹⁴⁴Advance disclosure of settlement costs is required under the Real Estate Settlement Procedures Act of 1974. 12 U.S.C.A. §§ 2601-2616 (Supp. 1, 1975). The accompanying regulations took effect in June 1975. 40 Fed. Reg. 22,449-58 (1975). For a discussion of this Act see Suess, *supra* at pp. 299-305.

¹⁴⁵319 N.E.2d 674 (Ind. Ct. App. 1974).

¹⁴⁶*Id.* at 676.

¹⁴⁷A conveyance creating a right-of-way or easement should describe the easement as well as the dominant estate. *Lennertz v. Yohn*, 118 Ind. App. 443, 79 N.E.2d 414 (1948).

¹⁴⁸IND. CODE § 23-4-1-9(1) (Burns 1972) (taken from the Uniform Partnership Act), was cited by the court as giving a general partner apparent authority to bind the partnership for “apparently carrying on in the usual way the business of the partnership.” 319 N.E.2d at 677.

XVII. Taxation*

During this survey period¹ there were significant interpretations of the Indiana inheritance tax statutes.² *In re Estate of Cassner*³ dealt with the meaning of the term "proceeds" under the Indiana inheritance tax statute, which exempts from inheritance tax all proceeds of life insurance payable to other than the decedent's estate.⁴ Cassner died the owner of four separate life insurance policies payable to his wife Mary. In addition to the face amount of the policies, Mary was entitled to accumulated dividends, post-mortem dividends, and termination dividends.⁵

An interesting but unanswered question grew out of the complex facts of this case. In sequence, the issues arose in this way: Partnership #1 owned the dominant and servient tracts, and mortgaged the dominant tract upon which an apartment house was built. The dominant tract was then sold to Partnership #2, and Partnership #1 became a general partner in it. Later Partnerships #1 and #2 executed the mortgage in question to the original mortgagee which apparently reaffirmed the original mortgage and for the first time granted to the mortgagee an easement on the servient tract. After this corrective mortgage was executed and recorded, Partnership #1 sold the servient tract to the plaintiff who claimed that he was not bound by the easement burdening the tract he purchased. The court held that the easement granted to the mortgagee was valid, but it was not clearly determined that the easement ran in favor of Partnership #2, the owner of the dominant estate.

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¹One other tax case decided during this survey year is worthy of notice. In *Griffin v. Boonville Sav. Ass'n*, 325 N.E.2d 494 (Ind. Ct. App. 1975), the First District Court of Appeals held that the plaintiff was not required to tender the redemption price of real property before a tax deed was issued to the purchaser at the sale as a condition precedent to challenging the legality of the entire original assessment and subsequent tax sale.

²IND. CODE §§ 6-4-1-1 *et seq.* (Burns 1972). Two amendments to the Indiana Code relating to inheritance tax matters should also be noted. These amendments altered the inheritance tax exemption and rate computation scheme. *Id.* §§ 6-4-1-2, -3 (Burns Supp. 1975), *amending id.* §§ 6-4-1-2, -3 (Burns 1972). Also, the legislature replaced the widow's allowance and support provisions for surviving children with a flat \$8,500 exemption for the surviving spouse, which passes free of Indiana inheritance tax. *Id.* § 29-1-4-1 (Burns Supp. 1975).

³325 N.E.2d 487 (Ind. Ct. App. 1975).

⁴IND. CODE § 6-4-1-1 (Burns 1972). The provision reads in pertinent part:

Proceeds of life insurance policies on the life of a decedent payable in such a manner as to be subject to claims against his estate and to distribution as a part thereof shall be hereunder held to be a part of the estate, but payable either directly or in trust for the use of any person or persons other than the estate so that it does not become a part thereof or subject to such claims, said proceeds shall not be taxed.

⁵325 N.E.2d at 488.

The State argued that the term proceeds includes the face value amount only and excludes all dividends because life insurance policies are a risk-shifting investment mechanism and dividends are not directly related to the risk.⁶ The executor of the estate maintained that such dividends had never been taxed under Indiana inheritance tax law and that exclusion of these dividends from proceeds would be contrary to existing federal tax laws.⁷ The Marion County Probate Court held that the beneficiary was entitled to receive these dividends as proceeds of life insurance free of Indiana inheritance tax.

On appeal by the State, Judge Buchanan, writing for the Second District Court of Appeals, stated that the intent of the legislature was to exclude all proceeds of life insurance policies from Indiana inheritance tax.⁸ He found that there was no basis for the narrow construction of the term proceeds offered by the State. Furthermore, following the State's interpretation would entail a departure from forty years of accepted interpretations of the Indiana inheritance tax statutes⁹ and from federal laws that include these dividends in proceeds of life insurance.¹⁰ Thus the court reaffirmed many years of accepted practice.

In *In re Estate of Osland*,¹¹ insurance proceeds were made payable to co-trustees of an *inter vivos* trust, and the trustees were authorized to use the proceeds to satisfy certain claims against the estate.¹² The State maintained that the discretionary powers

⁶*Id.* at 490. The State relied on the following cases: *Cahen Trust v. United States*, 292 F.2d 33 (7th Cir. 1961) (which indicated in dicta that the insurer was bound to pay the face value of the policy on the death of the insured); *In re Hamilton's Estate*, 113 Colo. 141, 154 P.2d 1008 (1945) (in which the Colorado Supreme Court construed a similar but not identical inheritance tax statute as excluding accumulated disability payments from proceeds of life insurance). The *Cassner* court distinguished both cases and did not consider the State's argument based on insurance law principles applicable because the concern in this particular instance was primarily with tax law. 325 N.E.2d at 490-91.

⁷325 N.E.2d at 288-89. See note 10 *infra*.

⁸325 N.E.2d at 490.

⁹*Id.* at 493. The court believed legislative action a more appropriate vehicle for change where the public's long reliance on established interpretations predisposes a court to accept those interpretations absent a compelling reason otherwise.

¹⁰*Id.* at 492, citing INT. REV. CODE OF 1954, § 2042. This section exempts from the beneficiary's income those lump-sum proceeds from life insurance policies and includes in the decedent's gross estate the amounts receivable by the executor and all other beneficiaries under life insurance policies on the life of the decedent.

¹¹328 N.E.2d 448 (Ind. Ct. App. 1975).

¹²*Id.* at 499. The trust indenture provided that the trustees had the discretion to pay the expenses of Osland's last illness, the funeral expenses, and

of the trust indenture made the transfer taxable.¹³ The estate pointed out that the proceeds were not distributable as a part of the decedent's estate nor subject to claims against the estate even though the proceeds could be used under the discretionary powers of the trustees to pay specified claims. Therefore, the proceeds were not subject to inheritance tax. The Boone County Superior Court agreed with the arguments presented by the estate and entered judgment excluding the proceeds from the inheritance tax.

The First District Court of Appeals clarified the two-fold test provided by the inheritance tax statute.¹⁴ In order to include proceeds in a decedent's estate for inheritance tax purposes, "the proceeds must be payable in such a manner so as to: (1) be subject to claims against the decedent's estate *AND* (2) be subject to distribution as part of the decedent's estate."¹⁵ Osland had transferred the ownership of the policies to the trustees and designated them as beneficiaries. The right to the proceeds had vested in the trustees and could not be subject to distribution as part of Osland's estate. Since the second requirement of the statute was not fulfilled, the proceeds could not be taxed under the Indiana inheritance tax law.¹⁶ The court found it unnecessary to decide whether or not the proceeds were subject to claims against the estate, but it is reasonable to conclude they were not.

*State Department of Revenue, Inheritance Tax Division v. Estate of Powell*¹⁷ dealt with the definition of life insurance for Indiana inheritance tax purposes. Powell had participated in his employer's pension plan, which required the trustees of the plan to purchase life insurance policies on the lives of the participants. The trustees were the beneficiaries and sole owners of the policies.¹⁸ Although the pension plan was primarily to provide retirement income, a participant had to designate to whom death bene-

any taxes chargeable to the estate. The principle source of funds for the trust were Osland's life insurance proceeds.

¹³IND. CODE § 6-4-1-1 (Burns 1972). This provision is set out at note 4 *supra*.

¹⁴328 N.E.2d at 449. This two-part requirement of IND. CODE § 6-4-1-1 (Burns 1972) was previously recognized by an opinion of the Attorney General. [1961] OPS. ATT'Y GEN. IND. No. 60, at 385.

¹⁵328 N.E.2d at 450, *construing* IND. CODE § 6-4-1-1 (Burns 1972) (emphasis supplied by the court).

¹⁶328 N.E.2d at 450.

¹⁷333 N.E.2d 92 (Ind. Ct. App. 1975).

¹⁸*Id.* at 94. The pension plan gave the trustees the right to sell or assign the policies, surrender them for cash, and change the beneficiaries. The pension plan and the life insurance policies limited the life insurance company's obligation to payment of the proceeds. The insurer was not required to oversee any distribution or application of the monies paid to the trustees.

fits would pass under the plan. There were two different provisions for payment to the beneficiary under the plan. If the participant died before retirement, the designated beneficiary would receive an immediate lump-sum payment; but, if the participant died after retirement, the designated beneficiary would receive at most 120 reduced payments.¹⁹ Powell designated his wife as his beneficiary, and upon his death, the trustees paid the same amount to Powell's widow as they received from the life insurance policies covering his life. The trial court held that these funds were life insurance proceeds payable to a designated beneficiary and thus were exempt from the Indiana inheritance tax.²⁰

On appeal to the First District Court of Appeals, the State argued that because the money was paid from the general pension fund and not specifically from the proceeds of the insurance policies, the money constituted death benefits and not life insurance proceeds. The State further pointed out that the purpose of the pension plan was post-employment benefits, and the same funds that were claimed as insurance proceeds under state law were exempted as an annuity on the federal estate tax return.²¹

In rejecting the State's argument, the court of appeals was careful to note that the employer's pension plan contemplated a special benefit by the purchase of these life insurance policies. The court held that as long as a third party employer's pension plan involves the essential elements of risk for the parties, it can operate as a conduit for life insurance proceeds; and the employee's beneficiary, although paid from the fund established and maintained by the employer, will not be the subject to Indiana inheritance tax on the proceeds.²² The provisions of this particular plan that required the trustees to pay the same amount received to the employee's named beneficiary clearly supported the court's finding that the monies paid to Powell's widow from the pension fund were life insurance proceeds.

This past year's litigation indicates that the Inheritance Tax Division of the State Department of Revenue narrowly interprets the scope of the statutory exemptions and exclusions from the

¹⁹333 N.E.2d at 102.

²⁰IND. CODE § 6-4-1-1 (Burns 1972). This provision is set out at note 4 *supra*.

²¹Powell had the power under the pension plan to change the beneficiary at his death. This incident of ownership would make the insurance proceeds taxable to his estate under federal law. INT. REV. CODE OF 1954, § 2042. The State argued that since the funds were from an exempted annuity under section 2039(c) of the Internal Revenue Code, the funds could not be held insurance proceeds under state law—to hold otherwise would allow taxpayers to change the nature of their income to satisfy different taxing authorities.

²²333 N.E.2d at 104.

Indiana inheritance tax. In rejecting the State's interpretations, the court of appeals preserved the expectations of the practicing bar and public—expectations that followed from years of accepted interpretations—and disavowed the piecemeal alteration of the statutory inheritance tax scheme.

XVIII. Torts

*James J. Brennan**

A. Tort v. Contract

In *Strong v. Commercial Carpet Co.*,¹ the Third District Court of Appeals, in an analysis premised upon the modern rules of pleading,² held that a plaintiff who brings an action predicated on both breach of contract and negligence is not required to elect his remedy and is entitled to seek recovery on both theories. The court prefaced its holding with a helpful discussion of when a claim will be actionable in both tort and contract. Following the traditional distinction between misfeasance and nonfeasance,³ the court stated that the total nonperformance of a promise is actionable only as a breach of contract, while the misperformance of a promise is actionable in tort as well as contract.⁴ Although the line between misfeasance and nonfeasance is often difficult to draw,⁵ the court concluded that the distinction provides a valid means of determining when a breach of contract can be characterized as a tort. While an action in tort generally is preferable because of the availability of greater damages,⁶ *Strong* should be

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¹322 N.E.2d 387 (Ind. Ct. App. 1975).

²The court relied exclusively on IND. R. TR. P. 8 (E) (2), which permits a plaintiff to seek relief on alternate theories of recovery.

³Dean Prosser concludes "that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 617 (4th ed. 1971) [hereinafter cited as PROSSER]. A leading case in this area is *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N.E. 503 (1906).

⁴322 N.E.2d at 390.

⁵See PROSSER § 92, at 618.

⁶Contract damages are limited by the well-known rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), that only those damages that were in the contemplation of the parties can be recovered. See generally 5 A.

particularly helpful to plaintiffs who have no available remedy in tort because of such barriers as the statute of limitations⁷ or the problems of proof inherent in negligence actions.⁸

B. Malicious Prosecution

The most important element that a plaintiff must establish to prevail in an action for malicious prosecution is that the defendant caused the criminal proceeding to be initiated against the plaintiff without probable cause.⁹ Accordingly, an affirmative showing that probable cause existed operates as a complete defense to an action for malicious prosecution. The most expedient way for a defendant to establish the existence of probable cause is to prove that he sought the advice of counsel before initiating the proceeding, and, after a full disclosure of all material facts, the counsel advised him that a reasonable basis for prosecution existed.¹⁰ Advice of counsel operates as a complete defense only if the advice is both sought and followed by the defendant in good faith.¹¹ Thus, it is not a defense when it appears that the defendant sought legal advice as a subterfuge to shield himself from liability for causing a groundless proceeding to be initiated.

While the existence of a collateral purpose for the plaintiff's initiation of prosecution generally relates to the element of malice, it is properly considered in the context of probable cause when the defendant raises the defense of advice of counsel. In *Barrow v. Weddle Brothers Construction*,¹² the First District Court of Appeals, exercising great deference to the inferences drawn from the record by the trial court, held that a finding that the defendant sought the advice of counsel in good faith was not precluded by a finding that the defendant offered to cause a criminal charge that it initiated to be dismissed if the plaintiff would satisfy a debt he owed to the defendant.¹³ The court noted that the defendant's alleged effort to use the criminal charge as a debt collection device could have supported a finding of bad faith, but

CORBIN, CORBIN ON CONTRACTS § 1007, at 70 (1950); C. McCORMICK, LAW OF DAMAGES § 137 (1935) [hereinafter cited at McCORMICK].

⁷The statute of limitations is 2 years for actions in tort, IND. CODE § 34-1-2-2 (Burns 1973), 10 years for actions based on written contracts, *id.*, and 6 years for actions based on oral contracts, *id.* § 34-1-2-1.

⁸For an excellent discussion of the consequences of choosing between a tort and a contract remedy see PROSSER § 92, at 618-22.

⁹See, e.g., L. GREEN, JUDGE AND JURY 341 (1930).

¹⁰E.g., *Indianapolis Traction & Terminal Co. v. Henby*, 178 Ind. 239, 97 N.E. 313 (1912); L. GREEN, *supra* note 9, at 344-45; PROSSER § 119, at 843.

¹¹See case and authorities cited note 10 *supra*.

¹²316 N.E.2d 845 (Ind. Ct. App. 1974).

¹³*Id.* at 848.

concluded that an inference of good faith could be drawn from the record as a whole.¹⁴

The court, however, need not have been concerned with the defendant's hostility towards the plaintiff. When the advice of counsel defense is not interposed, the existence of a collateral purpose has only slight significance to the probable cause issue. Since probable cause is measured primarily by the reasonableness of the defendant's belief in the guilt of the accused,¹⁵ the defendant need not have been "influenced by a desire to promote the public good"¹⁶ to have had probable cause to initiate charges against the plaintiff. Ill will is the basis of the element of malice, and lack of probable cause cannot be inferred from malice.¹⁷

C. Premises Liability

Few, if any, areas of Indiana tort law are more confused and unpredictable than that which has been referred to as the law of "premises liability."¹⁸ Indiana continues to adhere to the common law rules by which possessors of land are held to a gradient duty of care that depends entirely on the status attained by the injured entrants. Other jurisdictions have rejected the common law classification system and require that possessors exercise reasonable care toward all entrants, regardless of their status.¹⁹

¹⁴*Id.* at 852. A different result was reached in *Yerkes v. Washington Mfg. Co.*, 326 N.E.2d 629 (Ind. Ct. App. 1975), in which the First District Court of Appeals, in ruling on the propriety of a summary judgment, was required to resolve conflicting inferences in the plaintiff's favor. The defendant caused criminal proceedings to be initiated against the plaintiff for a violation of Indiana's "bad check" statute, IND. CODE § 35-17-5-10 (IND. ANN. STAT. § 10-3037, Burns Supp. 1975). The court held that the defendant was not entitled to summary judgment on the basis of the advice of counsel defense because affidavits submitted by the plaintiff gave rise to the inference that such advice was sought in bad faith. The affidavits alleged that the defendant had accepted the check with knowledge that it was drawn on insufficient funds and that he had agreed not to cash the check until the plaintiff's account was replenished. 326 N.E.2d at 632.

¹⁵*E.g.*, *Yerkes v. Washington Mfg. Co.*, 326 N.E.2d 629 (Ind. Ct. App. 1975).

¹⁶316 N.E.2d at 851, *quoting from* *Benson v. Bacon*, 99 Ind. 156 (1884).

¹⁷*Stivers v. Old Nat'l Bank*, 148 Ind. App. 196, 264 N.E.2d 339 (1970); L. GREEN, *supra* note 9, at 346.

¹⁸*See generally* Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

¹⁹*See, e.g.*, *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1972); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Pickard v. City of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969).

In *Hammond v. Allegetti*,²⁰ the first premises liability case decided by the Indiana Supreme Court since 1962,²¹ the court clarified Indiana law regarding the duty of care owed by possessors to invitees. The court held that possessors must exercise reasonable care under all circumstances for the safety of invitees and that the courts should not attempt to diminish this duty by erecting mechanical rules of law predicated on the existence of one particular circumstance.²² Since *Hammond* dictates that cases involving the possessor-invitee relationship be decided under the ordinary principles of negligence law, this facet of the law of premises liability should remain relatively free from confusion.

While *Hammond* establishes that the duty owed to invitees will always be the same, the courts have been unable to agree on a uniform definition of the duty owed by possessors to licensees and trespassers. Although courts frequently have stated that the only duty owed to trespassers and licensees is to avoid wilfully or wantonly injuring them,²³ the courts have created so many exceptions to the rule that this area of the law of premises liability has become a "semantic morass."²⁴ The recent First District Court of Appeals decision of *Pallikan v. Mark*²⁵ indicates that this unfortunate situation may continue to exist until the supreme court avails itself of an opportunity in a case involving a licensee or trespasser to author a decision as lucid and as well reasoned as *Hammond*.

In *Pallikan* an off-duty fireman was injured when he fell into a large, weed-covered hole located on the defendant's premises. The trial court granted summary judgment for the defendant on the issue of liability, and the court of appeals affirmed. After examining the pleadings for a genuine issue of material fact, the court of appeals found that there were no allegations

²⁰311 N.E.2d 821 (Ind. 1974).

²¹*Pier v. Schultz*, 243 Ind. 200, 182 N.E.2d 255 (1962), was the most recent of the supreme court's premises liability decisions prior to *Hammond*.

²²311 N.E.2d at 827-28. The court reversed the holding of the court of appeals that a landowner is under no duty to remove ice and snow from his premises. *Hammond* was recently applied by the First District Court of Appeals in *Poe v. Tate*, 315 N.E.2d 392 (Ind. Ct. App. 1974). Both courts emphasized that their holdings were limited to cases involving private areas rather than public areas, such as a public sidewalk.

²³*E.g.*, *Lingenfelter v. Baltimore & O.S.W. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900).

²⁴The United States Supreme Court used the phrase "semantic morass" to describe the common law rules of premises liability in a decision in which the Court refused to extend these rules to the law of admiralty. *Kemarec v. Compagnie Generale*, 358 U.S. 625, 630-31 (1959). See Note, *supra* note 18, at 1004.

²⁵322 N.E.2d 398 (Ind. Ct. App. 1975).

that the defendant took "positive action" to injure the plaintiff.²⁶ For this reason, the court concluded that it could not be said that the defendant had breached any duty that he owed to the plaintiff. The court relied primarily upon *Woodruff v. Bowen*,²⁷ an 1893 decision in which the supreme court held that firemen were licensees and that the only duty owed by possessors to licensees is "to refrain from any positive wrongful act which may result in [their] injury"²⁸ Although the phrase "positive wrongful act" arguably includes a positive negligent act, the courts of appeals have been unable to agree whether the *Bowen* court intended the phrase to denote negligent as well as wilful and wanton acts.²⁹

By limiting its inquiry to a determination of whether the defendant had alleged a positive wrongful act, the *Pallikan* court disregarded several other standards that Indiana courts have used to define the duty of care owed to licensees. Most significantly, the court failed to consider the "concealed trap doctrine," which provides that a possessor must disclose any concealed dangerous conditions on the premises of which he has knowledge.³⁰ Assuming that the plaintiff in *Pallikan* alleged that the defendant knew that the grass and weed-covered hole presented a foreseeable risk of harm to persons entering the premises, it is arguable that the concealed character of the hole created a situation "comparable to entrapment."³¹ For this reason, summary judgment may have been improvidently granted; the trier of fact should have been allowed to determine whether the standard of due care required that precautions be taken for the plaintiff's safety.

Another significant aspect of *Pallikan* is the court's expressed reluctance to overrule existing precedent absent legislative direction or the existence of "urgent reasons" to do so.³² Some states, indeed, have enacted legislation that requires all men to exercise

²⁶*Id.* at 399.

²⁷136 Ind. 431, 34 N.E. 1113 (1893).

²⁸*Id.* at 442, 34 N.E. at 1117.

²⁹Compare *Fort Wayne Nat'l Bank v. Doctor*, 149 Ind. App. 365, 272 N.E.2d 876 (1971), with *Surratt v. Petrol, Inc.*, 312 N.E.2d 487 (Ind. Ct. App. 1974).

³⁰See *Carrano v. Scheidt*, 388 F.2d 45 (7th Cir. 1967) (applying Indiana law); *Pier v. Schultz*, 243 Ind. 200, 182 N.E.2d 255 (1962); PROSSER § 60, at 380-82.

³¹The "condition comparable to entrapment" language was used by the Indiana Supreme Court in *Pier v. Schultz*, 243 Ind. 200, 182 N.E.2d 255 (1962), in reference to the "concealed trap doctrine." *Id.* at 204, 182 N.E.2d at 257.

³²322 N.E.2d at 400.

reasonable care in their daily pursuits.³³ Nevertheless, Indiana courts have not awaited legislative action in the past before abrogating traditional immunity doctrines.³⁴ It would seem that the confused state of the law in this area at least warrants a careful and forthright examination, if not the abrogation, of the common law rules of premises liability. Other reasons for abrogation have been presented, the most important of which is the need to develop a more rational method of imposing or denying the liability of possessors to entrants.³⁵ "The policy reasons behind protecting the interest of land ownership with minimal regard for the interest of human safety have lost their persuasive force."³⁶

Another important exception to the general rule that a possessor cannot be held liable for negligence to entrants other than invitees is the rule that a possessor must carry on his activities with due care for the safety of licensees.³⁷ The "active negligence" exception enjoyed the acceptance of Indiana courts³⁸ until it was overruled by the court of appeals several years ago in *Fort Wayne National Bank v. Doctor*.³⁹ Shortly after *Doctor* was decided, however, the rule apparently resurfaced in *Pierce v. Walters*⁴⁰ under the guise of the paradoxical phrase "wilful and wanton negligence." In the recent case of *Surratt v. Petrol, Inc.*,⁴¹ the Third District Court of Appeals disregarded *Doctor* and, in the course of determining by analogy the duty of care owed to a trespasser on a chattel, followed the *Restatement* rule that a possessor "owes a duty of reasonable care to a discovered trespasser not to injure him through active conduct."⁴²

³³*E.g.*, CAL. CIVIL CODE § 1714 (West 1973). The California Supreme Court relied on this statute in abrogating the common law classification system in *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

³⁴*See, e.g.*, *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972) (tort immunity of state); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972) (interspousal immunity). *But see* *Vaughan v. Vaughan*, 316 N.E.2d 455 (Ind. Ct. App. 1974) (court refused to abrogate parental immunity doctrine).

³⁵*See generally* Note, *supra* note 18.

³⁶*Id.* at 1003.

³⁷*See* PROSSER § 60, at 379-80; RESTATEMENT (SECOND) OF TORTS § 341 (1965).

³⁸*See* *Olson v. Kushner*, 138 Ind. App. 73, 211 N.E.2d 620 (1965); *Mills-paugh v. Northern Ind. Pub. Serv. Co.*, 104 Ind. App. 540, 12 N.E.2d 396 (1938); *Thistlethwaite v. Heck*, 75 Ind. App. 359, 128 N.E. 611 (1920); *Cleveland, C.C. & St. L. Ry. v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1914); *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912); Note, *supra* note 18, at 1026.

³⁹149 Ind. App. 365, 272 N.E.2d 876 (1971).

⁴⁰283 N.E.2d 560 (Ind. Ct. App. 1972). For a discussion of *Pierce* see Note, *supra* note 18, at 1030-31.

⁴¹312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

⁴²312 N.E.2d at 495, *following* RESTATEMENT (SECOND) OF TORTS § 336 (1965).

On petition for rehearing, the defendant contended that the court's application of the active negligence rule was inconsistent with *Doctor*.⁴³ Squarely addressing this contention, Judge Garrard examined the authorities relied upon by the *Doctor* court and held that they supported that conduct, whether characterized as active, affirmative or positive, provides a basis for holding a possessor liable to discovered trespassers for negligence.⁴⁴ Although *Surratt* cannot be considered a true premises liability case since it involved liability to trespassers on chattels, the court's decision is significant to the law of premises liability in at least two respects. First, the court engaged in a well-reasoned analysis of earlier Indiana decisions and concluded that in many of these decisions the courts, in fact, applied the standard of due care under the guise of other doctrines.⁴⁵ Second, *Surratt* indicates that the active negligence doctrine will continue to be used by at least some Indiana courts to hold possessors of land to the standard of reasonable care under the circumstances in cases involving licensees and trespassers. The obvious conflict between the courts of appeals concerning the active negligence exception to the wilful-wanton rule presents an issue seriously in need of resolution by the supreme court. While the active negligence doctrine serves the commendable purpose of circumventing the common law rules, recognition of the doctrine could create as many problems as it would solve. The distinction between active and passive negligence is a fiction, the artificiality of which has the potential of breeding confusion and perpetuating the common law classification.⁴⁶

Although a landlord generally is under no duty to take affirmative steps to remedy defective conditions existing on leased premises, he is responsible for maintaining those portions of the premises over which he exercises possession and control.⁴⁷ The "possession and control" exception to the general rule of nonliability generally is applied in situations in which the dangerous condition is located in an area where tenants could reasonably be expected to be present, such as a common passageway or an

⁴³316 N.E.2d 453 (Ind. Ct. App. 1974).

⁴⁴*Id.* at 454-55.

⁴⁵For example, the court engaged in an excellent discussion of how earlier courts used the "last clear chance" doctrine to hold possessors to a duty of due care. 312 N.E.2d at 493. See also Note, *supra* note 18, at 1010-12.

⁴⁶Since it is often difficult to distinguish between active and passive negligence, a more logical approach would be to hold the possessor to a duty of reasonable care under all circumstances. Cf. Hughes, *Duty To Trespassers*, 68 YALE L.J. 633, 648-49 (1959); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 174-75 (1953).

⁴⁷PROSSER § 63, at 405-08.

approach.⁴⁸ In this situation, the landlord has an affirmative obligation to make reasonable repairs and inspections to prevent tenants and other entrants from being exposed to unreasonable risks of harm.

An unusual application of this exception to the general rule of nonliability was made by the Second District Court of Appeals in *Parr v. McDade*.⁴⁹ The plaintiff, a tenant of the defendant, was injured when he jumped from his second story apartment to escape a fire occasioned by a defective gas heater located in the apartment of the defendant's resident manager. The proof showed that both the defendant and his resident manager were aware of the defective heater, and that the defendant previously had promised the resident manager that the defective heater would be replaced.⁵⁰ The defendant appealed from a substantial jury verdict on the ground that, *inter alia*, he was under no duty to the plaintiff either to repair the defective heater or prevent the defendant manager from using it.

The court of appeals affirmed the decision below, relying on two alternate grounds for establishing the defendant's negligence. First, the court concluded that the employer-employee relationship between the defendant and the resident manager placed the resident manager's apartment, the situs of the defective heater, within the possession and control of the defendant.⁵¹ On this basis, the court approved the trial court's instruction that a landlord must take reasonable steps to remedy known dangerous conditions that exist in areas under his possession and control.

As an alternate basis for its decision, the *Parr* court looked beyond the landlord-tenant relationship to find the existence of a duty of reasonable care. The defendant had argued that, since the resident manager used the gas heater for the sole purpose of her comfort and enjoyment, the resident manager's negligent use of the heater was an act outside of the scope of the employment relationship, for which the defendant could not be held responsible. The court rejected this argument, adopting the *Restatement* view that, under certain circumstances, "a master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from . . . conducting himself as to create an unreasonable risk of bodily harm to [others] . . ."⁵² Applying this rule, the court concluded

⁴⁸See RESTATEMENT (SECOND) OF TORTS § 360, Comment d (1965).

⁴⁹314 N.E.2d 768 (Ind. Ct. App. 1974).

⁵⁰*Id.* at 770.

⁵¹*Id.* at 771-72.

⁵²RESTATEMENT (SECOND) OF TORTS § 317, at 125 (1965).

that the defendant's failure to prevent his resident manager from using the heater on the premises was actionable negligence.

D. Reasonable Care

Dean Prosser has stated that the standard of reasonable care under the circumstances "is as wide as all human behavior."⁵³ For this reason, the standard seldom, if ever, can be fixed by the creation of absolute rules. The courts, nevertheless, have found it helpful to establish certain formulas that are capable of being adapted to jury instructions that fix the standard of care in recurring fact situations. Several of these formulas have been referred to by courts as "doctrines." Since the term "doctrine" suggests the existence of a mechanical rule of uniform application, it must be kept in mind that the duty to exercise reasonable care is a full one that should not be diluted by rules of law based upon the presence of one particular circumstance in a given case.⁵⁴ Accordingly, cases in which the courts have held that a particular type of conduct represents negligence or contributory negligence as a matter of law are often of dubious precedential value.⁵⁵

There are numerous decisions in which Indiana courts have found a plaintiff contributorily negligent as a matter of law when he voluntarily and intentionally exposed himself to a danger created by the defendant's negligence.⁵⁶ In two cases decided during the survey period, the courts were urged by the defendants to apply this so-called "equal knowledge doctrine" to remove the issue of contributory negligence from the jury's consideration and deny recovery as a matter of law. In both cases the courts rejected the application of the "doctrine" and looked to the particular circumstances before them.

In *Hobby Shops, Inc. v. Drudy*,⁵⁷ a 13-year-old boy was seriously injured when, while running through the defendant's parking lot, he collided with a cable erected several feet above ground level. The defendant argued on appeal from a jury verdict that the plaintiff previously had seen the cable, and, therefore, possessed equal knowledge of its perils. In rejecting this contention the Third District Court of Appeals reasoned that, although the plaintiff may have known of the condition, he may not have appreciated its dangers. Recognizing that both knowledge

⁵³PROSSER § 35, at 188.

⁵⁴See *Hammond v. Allegretti*, 311 N.E.2d 821 (Ind. 1974).

⁵⁵PROSSER § 35, at 188.

⁵⁶See, e.g., *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965). See also *Sullivan v. Baylor*, 325 N.E.2d 475 (Ind. Ct. App. 1975) (incurred risk).

⁵⁷317 N.E.2d 473 (Ind. Ct. App. 1974).

and appreciation of the risk are essential elements of contributory negligence, the court held that it was within the province of the jury to find that the plaintiff, in light of his age, intelligence and experience, did not appreciate the risk that the cable presented.⁵⁸

In *Dreibelbis v. Bennett*⁵⁹ the defendant was struck by a passing automobile as he attempted to place safety flares around a disabled vehicle. The defendant argued on appeal that the plaintiff was guilty of contributory negligence as a matter of law on the basis of the "equal knowledge doctrine." The Third District Court of Appeals rejected this argument by stating that the "doctrine" is limited to cases in which both the plaintiff and defendant were active participants in a dangerous activity.⁶⁰ This seems to be an artificial distinction, primarily because it is often difficult, if not impossible, to determine whether particular conduct is "active" or "passive."⁶¹ A more logical approach is found in the *Restatement*, which provides that an intentional and unreasonable exposure to a dangerous condition need not be considered contributory negligence "if such exposure is necessary to the safety of a third person or to accomplish some end which is purely in the public interest"⁶² In *Dreibelbis*, the plaintiff's voluntary efforts to erect the safety flares when others failed to do so seems to have been of legal significance worthy of the court's express recognition.

Another formula used by the courts to delineate the standard of reasonable care in particular fact situations is the "sudden emergency doctrine." In its simplest terms, this formula provides that when an actor is confronted by a sudden emergency and is required to make a hasty choice of which alternative course of action to pursue, the emergency is one factor for the jury to consider in determining whether his choice of available alternatives was an unreasonable choice.⁶³ An important limitation on the "doctrine," as recently recognized by the First District Court of Appeals in *Anderson v. Western*,⁶⁴ is that the existence of an emergency cannot be considered in measuring the reasonableness of the actor's conduct when the actor's own negligence has created the emergency. The emergency cannot be considered in this situa-

⁵⁸*Id.* at 479.

⁵⁹319 N.E.2d 634 (Ind. Ct. App. 1974).

⁶⁰*Id.* at 639.

⁶¹See James, *supra* note 46, at 174-75.

⁶²RESTATEMENT (SECOND) OF TORTS § 466, Comment c, at 512 (1965).

⁶³For an approved "sudden emergency" instruction, see *Baker v. Mason*, 253 Ind. 349, 349, 242 N.E.2d 513, 514 (1968).

⁶⁴320 N.E.2d 759 (Ind. Ct. App. 1974).

tion because it was not an existing circumstance at the time of the actor's negligence.⁶⁵

When there is sufficient time for deliberation, the actor is required to exercise greater judgment in weighing alternate courses of action. The courts have characterized this weighing process in a formula that has been referred to as the "choice of ways doctrine."⁶⁶ In *Easley v. Williams*,⁶⁷ the plaintiff, an elderly pedestrian, was injured when she was struck by the defendant's truck as the defendant backed it out of a driveway. A general verdict was entered in favor of the defendant, but the trial court granted the plaintiff's motion to correct errors on the ground that, *inter alia*, it was error to instruct the jury on the "choice of ways doctrine." The record showed that the plaintiff had observed the defendant in his truck before she crossed the driveway and that several paths other than across the driveway were available.⁶⁸ Two of the First District Court of Appeals judges agreed that the choice of ways doctrine was inapplicable because the evidence did not show that the path chosen by the plaintiff involved "a danger so great and apparent that an ordinary person would not have chosen that way"⁶⁹ and that it would have been too burdensome for the plaintiff, who walked with the assistance of a cane, to select an alternate path.⁷⁰ Judge Staton, in dissent, viewed the record differently, stating that there was no evidence that any of the alternative routes available to the plaintiff were more devious than the route that she pursued or that an alternative route would have been unduly burdensome.⁷¹

Two cases decided during the survey period involved the propriety of potentially misleading jury instructions. In *Chamberlain v. Deaconess Hospital, Inc.*,⁷² the trial court included the phrase "proximate cause of the accident" in a contributory negligence instruction. The term "accident," of course, technically refers to a situation in which no one was negligent.⁷³ The First District Court of Appeals strongly disapproved the use of the term in negligence cases, but, upon reviewing the instructions in their entirety, concluded that the jury was not misled. Ironically, an-

⁶⁵PROSSER § 33, at 169-70.

⁶⁶See, e.g., *City of Mitchell v. Stevenson*, 136 Ind. App. 340, 201 N.E.2d 58 (1964).

⁶⁷321 N.E.2d 752 (Ind. Ct. App. 1975).

⁶⁸*Id.* at 755 (Staton, J., dissenting).

⁶⁹*Id.* at 754.

⁷⁰*Id.*

⁷¹The existence of "more devious" alternate routes was one of the reasons stated by the trial court for granting a new trial. Judge Staton concluded that this finding was not supported by the record. *Id.* at 755.

⁷²324 N.E.2d 172 (Ind. Ct. App. 1975).

⁷³PROSSER § 29, at 140.

other appellate panel liberally used the term "accident" in reference to a situation in which the negligence of a motorist apparently contributed to the injury of the plaintiff.⁷⁴

In *Spears v. Aylor*⁷⁵ the trial court instructed the jury that the existence of contributory negligence, "however slight," would bar a plaintiff's recovery. Instructions of this nature are not uncommon, for phrases such as "however slight" or "in any manner" are often used by trial courts to dispel any notions of the comparative negligence doctrine from the minds of jurors.⁷⁶ The Third District Court of Appeals expressed strong disapproval of instructions of this nature, but again concluded that the trial court had not committed reversible error. The court's disapproval of the phrase "however slight" is not surprising, for trial judges occasionally have used it inadvertently to refer to the element of causation rather than negligence.⁷⁷ Since a slight cause by definition cannot be a proximate cause, the confusion of slight causation with slight negligence has been held to be reversible error.⁷⁸ The prudent approach, therefore, would be to eliminate the phrase "however slight" from all contributory negligence instructions. As noted by the court in *Spears*, such a subtle reference to the comparative negligence doctrine is unlikely to have its intended effect on the jury.⁷⁹

In *Indianapolis Union Railway v. Walker*,⁸⁰ the First District Court of Appeals set forth definitive guidelines for determining when the absence or presence of warning devices at a public crossing is a factor to be considered in determining whether a railroad is liable for negligence. The rule has long been that railroads are under a duty to exercise reasonable care in operating their trains.⁸¹ The *Walker* court held that since due care is measured in light of the totality of circumstances, it is appropriate to consider the presence or absence of warning devices in determining whether a railroad operated its train in a negligent manner.⁸² This is a sound approach, for persons operating a train ordinarily should be required to take greater precautions when approaching unguarded crossings than would be necessary if warning devices were present. On the other hand, a railroad cannot be held liable

⁷⁴See *Dreibelbis v. Bennett*, 319 N.E.2d 634 (Ind. Ct. App. 1974).

⁷⁵319 N.E.2d 639 (Ind. Ct. App. 1974).

⁷⁶PROSSER § 65, at 421.

⁷⁷See *Huey v. Milligan*, 242 Ind. 93, 175 N.E.2d 698 (1961).

⁷⁸*Id.*

⁷⁹319 N.E.2d at 643.

⁸⁰318 N.E.2d 578 (Ind. Ct. App. 1974).

⁸¹*Pennsylvania R.R. v. Sherron*, 230 Ind. 610, 105 N.E.2d 334 (1952).

⁸²318 N.E.2d at 582, citing *Pennsylvania R.R. v. Sherron*, 230 Ind. 610, 105 N.E.2d 334 (1952).

for its failure to erect and maintain warning devices at a public crossing unless a statute or ordinance so requires or the crossing is found to be "extra-hazardous."⁸³ Only in these latter circumstances, can negligence specifically be predicated on the failure to erect and maintain warning devices. While the common practice is to charge expressly that the crossing must be found to have been extra-hazardous before such a duty could be imposed, the *Walker* court held that an instruction permitting the jury to consider the presence or absence of warning devices together with the circumstances that could have rendered the crossing extra-hazardous did not represent reversible error.⁸⁴

E. Proximate Cause

In *Surratt v. Petrol, Inc.*,⁸⁵ the defendant left his car in an allegedly high crime area without removing the ignition key. A thief stole the vehicle and, shortly thereafter, disregarded a stop sign and collided with another vehicle. The plaintiff, a passenger in the stolen vehicle, brought an action against the defendant on the ground that the failure to remove the key from the ignition switch was actionable negligence. The trial court granted summary judgment in the defendant's favor on the issue of liability.

The Third District Court of Appeals affirmed the trial court, holding that the owner's negligently leaving his ignition key in a parked automobile "could not be considered the proximate cause of injuries later resulting from the negligent operation of the stolen automobile by a thief."⁸⁶ The court based its holding on the earlier decision of *Kiste v. Red Cab, Inc.*,⁸⁷ in which the court held that the failure to remove the ignition key from an unattended automobile, whether it be deemed common law negligence or negligence per se,⁸⁸ could not be considered the proximate cause of the plaintiff's injuries because the negligent driving of the thief was an effective intervening cause that superseded any negligence of the defendant.⁸⁹ The *Surratt* court rejected the plaintiff's contention that *Kiste* created an exception

⁸³318 N.E.2d at 582-83, citing *Central Ind. R.R. v. Anderson Banking Co.*, 252 Ind. 270, 247 N.E.2d 208 (1969).

⁸⁴318 N.E.2d at 583.

⁸⁵312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

⁸⁶312 N.E.2d at 490.

⁸⁷122 Ind. App. 587, 106 N.E.2d 395 (1952).

⁸⁸IND. CODE § 9-4-1-116 (Burns 1973) provides that it is illegal to leave a motor vehicle unattended without first removing the ignition key. Neither the *Kiste* nor the *Surratt* court considered whether a violation of this statute constituted negligence per se, although the respective plaintiffs appear to have relied on this theory as well as on common law negligence.

⁸⁹122 Ind. App. at 596, 106 N.E.2d at 399.

to the general rule of nonliability in cases in which the automobile was left unattended in a high crime area.⁹⁰

Although the result reached in *Surratt* is in accord with the majority view,⁹¹ the court's reliance on proximate cause to deny recovery seems to have thwarted its apparent attempt to foreclose the possibility of recovery in future "key theft" cases.⁹² Since foreseeability is the ultimate test of proximate cause,⁹³ it logically follows that proximate cause should be a question for the jury when the consequences of one's failure to remove the ignition keys from his unattended vehicle are foreseeable. It is submitted that if a future case were to arise in which the plaintiff could show that it was foreseeable that a thief would steal the vehicle *and* that he would drive it negligently, the proximate cause rationale relied on in *Surratt* would dictate that recovery not be denied as a matter of law. Such a showing seems entirely possible, since recent studies support the conclusion that a thief is more likely to drive an automobile negligently than the average motorist.⁹⁴

The courts have not been reluctant to submit the issue of proximate cause to the jury in cases in which the negligent driving of another was a foreseeable risk. In *Dreibelbis v. Bennett*⁹⁵ the defendant was involved in an automobile-truck collision on a two lane highway. Although the disabled vehicles were blocking a major portion of the highway, the defendant left the area to notify the police. The plaintiff, who had stopped at the scene of the collision for the purpose of providing assistance if it were needed, posted several warning flares around the defendant's vehicle when it became apparent that the defendant had not done so. While attempting to rekindle a flare that had been extin-

⁹⁰Dicta in *Kiste* suggest that such a result would follow if it were also foreseeable that a thief would drive the stolen vehicle negligently.

⁹¹See PROSSER § 44, at 283.

⁹²The *Kiste* court, upon examining numerous decisions from other jurisdictions, selected the proximate cause rationale over several other theories as a means of denying recovery. The court stated that future "key-theft" cases could be adjudicated "most decisively" on this basis. 122 Ind. App. at 594, 106 N.E.2d at 398. Apparently, the court believed that a high probability of crime was a reality in other jurisdictions, but would never be a foreseeable circumstance in Indiana. *Id.* at 596, 106 N.E.2d at 399. Perhaps changing social conditions dictate that this premise of fact be re-examined.

⁹³See, e.g., *Dreibelbis v. Bennett*, 319 N.E.2d 634, 638 (Ind. Ct. App. 1974).

⁹⁴See Peck, *An Exercise Based upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909. The *Surratt* court held that it was harmless error, at most, for the trial court to refuse to consider the plaintiff's offer to prove that the vehicle was stolen in a high crime area. 312 N.E.2d at 490. There is no indication in the opinion that the plaintiff attempted to prove the foreseeability of the thief's negligent driving.

⁹⁵319 N.E.2d 634 (Ind. Ct. App. 1974).

guished by a passing vehicle, the plaintiff was struck by a passing motorist who was attempting to avoid colliding with the defendant's vehicle.

The plaintiff brought an action against the defendant on the ground that he violated an Indiana statute that requires drivers of disabled vehicles to display luminous warning devices about their vehicles under certain circumstances.⁹⁶ The jury returned a verdict for the plaintiff, and the defendant appealed on the ground that the trial court erred when, *inter alia*, it submitted the issue of proximate cause to the jury. The Third District Court of Appeals rejected the defendant's contention that the negligent driving of the motorist was an effective intervening cause and held that it was reasonably foreseeable that the negligence of the motorist would concur with that of the defendant to proximately cause the plaintiff's injuries.⁹⁷ This holding is in accord with the general view that a risk created by one's negligence may include the foreseeable intervention of the negligence of others.⁹⁸

F. Damages

The recent enactment of legislation in many states requiring the installation of seat belts in automobiles⁹⁹ has prompted defense attorneys to maintain that a plaintiff's failure to have his seat belt fastened at the time of an automobile collision should be considered contributory negligence.¹⁰⁰ This view has uniformly been rejected since the failure to use seat belts cannot be considered the proximate cause of the collision that caused the initial damage.¹⁰¹ Some courts and commentators, however, have taken the position that the failure to use seat belts can be relied on to reduce the amount of a plaintiff's recovery under the doctrine of avoidable consequences.¹⁰² The doctrine of avoidable consequences, like the doctrine of contributory negligence, is premised on the

⁹⁶IND. CODE § 9-8-6-42 (Burns 1973).

⁹⁷319 N.E.2d at 637-38.

⁹⁸See, e.g., PROSSER § 44, at 274.

⁹⁹See, e.g., IND. CODE §§ 9-8-7-1 to -3 (Burns 1973). It is interesting to note that an Indiana trial court once held that this statute implied the mandatory use of seat belts and fined a motorist for his failure to wear them. See *La Porte Herald-Argus*, Dec. 3, 1964, at 6, col. 1-2; 16 DE PAUL L. REV. 521, 523 (1967).

¹⁰⁰See Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613 (1967); Comment, *Seat Belts and Contributory Negligence*, 12 S.D.L. REV. 130 (1967).

¹⁰¹See Note, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 97 (1969).

¹⁰²See *Barry v. Coca Cola Co.*, 99 N.J. Super. 270, 239 A.2d 273 (1967); Comment, *Seat Belts and Contributory Negligence*, 12 S.D.L. REV. 130 (1967).

notion that a plaintiff must exercise due care for the protection of his own interests before he can shift to a negligent defendant the loss for damage to those interests. However, unlike contributory negligence, which is an absolute bar to the plaintiff's recovery, avoidable consequences bars recovery only to the extent that the plaintiff's damages could have been avoided through his exercise of due care. For this reason, the doctrine of avoidable consequences often has been referred to as a rule of damages rather than as an affirmative defense.¹⁰³

The effect of a plaintiff's failure to fasten his seat belts was recently considered by the Third District Court of Appeals in *Birdsong v. ITT Continental Baking Co.*¹⁰⁴ The plaintiff in *Birdsong* had stopped his automobile and was preparing to turn when he was struck from the rear by the defendant. The plaintiff appealed from a jury verdict in the defendant's favor on the ground that a nebulous "seat belt" instruction tendered to the jury by the trial court constituted reversible error.¹⁰⁵ Judges Staton and Lybrook agreed that the instruction was erroneous in that it was misleadingly couched in language referring to both contributory negligence and the apportionment of damages. They disagreed, however, on whether the instruction was an attempt to apply the doctrine of avoidable consequences or the doctrine of comparative negligence.

Judge Staton considered the instruction an attempt to invoke the comparative negligence doctrine since it allowed the jury to reduce the plaintiff's damages in proportion to the degree of negligence the jury assigned to the plaintiff's failure to fasten his seat belts.¹⁰⁶ He reasoned that the instruction was inconsistent with other instructions, stating that contributory negligence operates as a complete bar to recovery, and presumed that it misled the jury.

Judge Lybrook, in a concurring opinion, agreed that, if taken out of context, the phrase "contributory negligence" could have misled the jury. He placed greater emphasis, however, on language limiting the jury's consideration of the plaintiff's failure to fasten his seat belts to the issue of damages.¹⁰⁷ His analysis of the instruction was premised on the trial court's attempt to apply the doctrine of avoidable consequences. Judge Hoffman ap-

¹⁰³McCORMICK § 34.

¹⁰⁴312 N.E.2d 104 (Ind. Ct. App. 1974).

¹⁰⁵*Id.* at 105-06 (instruction set forth).

¹⁰⁶Judge Staton also set forth a helpful footnote detailing the status of the comparative negligence doctrine and modifications thereof throughout the country. 312 N.E.2d at 106-07 n.1.

¹⁰⁷*Id.* at 108.

parently agreed with this analysis of the instructions. He concluded in his dissenting opinion, in obvious reference to the doctrine, that the tendering of the instruction was harmless error since the jury, in finding for the defendant, never reached the issue of damages.¹⁰⁸

The primary problem with applying the doctrine of avoidable consequences is that it is difficult to prove that a separable part of the plaintiff's injury would not have occurred but for the fact that the plaintiff had left his seat belt unfastened.¹⁰⁹ At the present time this seems to be an insurmountable burden for the plaintiff in a "seat belt" case. In a case similar to *Birdsong*, the Indiana Supreme Court refused to apply the doctrine in spite of expert testimony that the plaintiff would not have suffered an eye injury had he been wearing his seat belts.¹¹⁰ Nevertheless, Indiana courts seem to have recognized that the doctrine has merit in appropriate circumstances.¹¹¹ Despite Judge Lybrook's skepticism that an avoidable consequences instruction could ever be drafted properly,¹¹² it seems likely that the doctrine would be applied by the court if a case were to arise in which a separable portion of the plaintiff's damages could be shown to a reasonable degree of certainty to have been caused by his lack of due care.

In *Rieth-Riley Construction Co. v. McCarrell*,¹¹³ the First District Court of Appeals held that "the mere fact that a plaintiff was unemployed at the time of his injury does not, in and of itself, preclude the value of recovery for the value of time lost from the date of injury to trial."¹¹⁴ The court prefaced this holding with an instructive discussion of the damage component generally referred to as "impaired earning ability."¹¹⁵ Relying primarily upon secondary authority to support its decision,¹¹⁶ the court separated "impaired earning ability" into two distinct elements: loss of time and decreased earning capacity. The loss of time element, the court reasoned, refers to the value of the time that the plaintiff lost before trial because of his injury. Decreased earning capacity refers to the impairment of the plaintiff's future earning capacity and is measured by the extent to which the plaintiff's ability to earn money in the future has been diminished.

¹⁰⁸*Id.* at 109 (Hoffman, J., dissenting).

¹⁰⁹PROSSER § 65, at 422-24.

¹¹⁰*Kavanagh v. Butorac*, 140 Ind. App. 139, 221 N.E.2d 824 (1966).

¹¹¹*See id.*

¹¹²312 N.E.2d at 108-09.

¹¹³325 N.E.2d 844 (Ind. Ct. App. 1975).

¹¹⁴*Id.* at 849.

¹¹⁵*Id.* at 847.

¹¹⁶The court quoted extensively from 22 AM. JUR. 2D *Damages* § 100 (1965).

The holding in *Rieth-Riley* is in accord with the generally accepted view that the true basis of recovery for the impairment of earning ability experienced between the date of injury and the date of trial "is the 'value' of the plaintiff's time, that is, what his services would have brought in the labor market, of which actual wages would merely be evidence."¹¹⁷ As recognized in *Rieth-Riley*, however, other courts, including the Indiana Court of Appeals,¹¹⁸ have held that damages can be claimed and recovered solely on the basis of the actual wages that the plaintiff had lost up to the date of trial.¹¹⁹ It has been suggested that no practical or theoretical difficulties would arise if plaintiffs were permitted to select either the value of lost wages or the value of lost time as their basis of recovery.¹²⁰ It is arguable that either basis of recovery is now acceptable in Indiana.

Rieth-Riley also seems to have resolved a question left unanswered by the court of appeals in *Cooper v. High*.¹²¹ In *Cooper* the court expressly declined to decide whether work performed on an exchange basis could be considered in awarding damages for impaired earning ability. The *Rieth-Riley* court plainly stated that homemakers and persons who perform services gratuitously can recover for the value of lost time and the impairment of future earning capacity.¹²² This result logically follows from the court's conclusion that "a plaintiff has a right to his own time which cannot be taken from him by a tortfeasor without compensation"¹²³ The court set forth the caveat, however, that persons who were not earning wages at the time of injury can expect to encounter difficulty in proving their damages to the requisite degree of certainty. Accordingly, the non-wage-earner plaintiff must remove the amount of damages he seeks to recover from the realm of speculation by introducing evidence of his "age, life expectancy, health, training, experience, intelligence, and talents, as well as the nature of the injury."¹²⁴

In *Scott County School District 1 v. Asher*,¹²⁵ the Indiana Supreme Court held that an unemancipated minor as well as his parents can recover the value of medical expenses incurred for

¹¹⁷McCORMICK § 87, at 310.

¹¹⁸Scott v. Nabours, 296 N.E.2d 438 (Ind. Ct. App. 1973).

¹¹⁹See McCORMICK § 87, at 309-10.

¹²⁰*Id.*

¹²¹303 N.E.2d 829 (Ind. Ct. App. 1973), *aff'd*, 317 N.E.2d 177 (Ind. 1974).

¹²²325 N.E.2d at 848, *citing* 22 AM. JUR. 2D *Damages* § 100 (1965).

¹²³325 N.E.2d at 848, *quoting from* 22 AM. JUR. 2D *Damages* § 100 (1965).

¹²⁴325 N.E.2d at 849.

¹²⁵324 N.E.2d 496 (Ind. 1975).

the treatment of injuries inflicted upon him by a tortfeasor. Although it has long been recognized that parents can recover such expenses,¹²⁶ a conflict in the courts of appeals had developed over whether a minor's recovery was limited to medical expenses incurred after emancipation.¹²⁷ The *Asher* court reasoned that a minor is liable in contract for such medical expenses under the rule that a minor's contract is not voidable when the contract is for "necessaries." On this basis, the court held that when a minor and his parents are both liable to the provider of medical services, both should be entitled to compensation. A double recovery will not be permitted, however; and in a future action against a tortfeasor seeking recovery of such expenses, the tortfeasor is entitled to raise, by way of defense, a judgment previously paid to either the minor or the minor's parents. It is interesting to note that the holding in *Asher* is limited by its facts to past medical expenses. The court's reliance on a New York case¹²⁸ suggests that future expenses likely to be incurred until the child attains the age of majority are recoverable only by the child. The reasoning behind the latter rule is that "the safety of the child will be promoted by allowing the child to recover for the future cost of medical expenses, rather than the parent, who may collect the amount and then fail to devote it to the care of the child."¹²⁹

G. Medical Malpractice

An act to regulate medical malpractice is one of the most important pieces of legislation passed this year by the Indiana General Assembly.¹³⁰ The Act, which applies only to claims arising out of an act of alleged medical malpractice occurring after July 1, 1975,¹³¹ sets limits on recovery under claims of medical malpractice and provides a detailed procedure for the settlement or litigation of these claims.

¹²⁶See, e.g., IND. CODE § 34-1-1-8 (Burns Supp. 1975); McCORMICK § 91.

¹²⁷Compare *Scott County School Dist. 1 v. Asher*, 312 N.E.2d 131 (Ind. Ct. App. 1974), with *Allen v. Arthur*, 139 Ind. App. 460, 220 N.E.2d 658 (1966).

¹²⁸*Clarke v. Eighth Ave. R.R.*, 238 N.Y. 246, 144 N.E. 516 (1924).

¹²⁹McCORMICK § 91, at 329.

¹³⁰IND. CODE §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975) [hereinafter referred to as the Act]. Indiana is not the only state to have confronted the medical malpractice dilemma. At the time of this writing at least fourteen other states have passed legislation this year dealing with some aspect of medical malpractice: California, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, New York, Nevada, North Carolina, North Dakota, South Dakota, Washington, and Wisconsin.

¹³¹*Id.* § 16-9.5-1-7.

1. Limitations on Recovery

Those medical professions sheltered by the Act are denominated "health care providers." A health care provider is defined as follows:

A person, corporation, facility or institution licensed by this state to provide health care or professional services as a physician, hospital, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.¹³²

The health care provider must be "qualified" under the Act in order to enjoy its protection.¹³³ Qualification is not, however, very difficult to attain; all a health care provider need do to qualify is to obtain liability insurance in the amount of \$100,000 per occurrence and pay a special surcharge assessed by the commissioner of insurance to finance a state sponsored patient compensation fund.¹³⁴

If the health care provider is qualified, his potential maximum liability for any act of malpractice is \$100,000.¹³⁵ Any award or settlement exceeding \$100,000 is paid from the state's patient compensation fund.¹³⁶ In no event, however, may any award or settlement exceed the statutory maximum recovery of \$500,000.¹³⁷

¹³²*Id.* § 16-9.5-1-1(a).

¹³³*Id.* § 16-9.5-1-5.

¹³⁴*Id.* § 16-9.5-2-1.

¹³⁵*Id.* § 16-9.5-2-2(b). Several other states have also placed a lid on the medical practitioner's liability. N.D. CENT. CODE § 26-40-11 (Supp. 1975) (\$500,000); Act of May 20, 1975, ch. 75-9, § 15, [1975] FLA. SESS. LAW SERV. No. 1, at 17-18 (West 1975), *to be codified as* FLA. STAT. § 627.353(1)(b) (\$100,000); ch. 162, §§ 4, 5, [1975] Idaho Sess. Laws 422 (\$150,000 for injury or death to one patient, \$300,000 for injury or death to more than one patient); Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.42(B)(2) (\$100,000); Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 48-49 (West 1975), *to be codified as* WIS. STAT. § 655.23 (\$200,000 per occurrence/\$600,000 per year).

¹³⁶IND. CODE § 16-9.5-2-2(c) (Burns Supp. 1975). State sponsored funds have been created to pay the amount in excess of the health care provider's liability in at least three other jurisdictions. Act of May 20, 1975, ch. 75-9, § 15, [1975] FLA. SESS. LAW SERV. No. 1, at 18-19 (West 1975), *to be codified as* FLA. STAT. § 627.353(2); Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383-84 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.42(B)(3); Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 50-53 (West 1975), *to be codified as* WIS. STAT. § 655.27.

¹³⁷IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975). Similar legislation has been passed in other states. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT.

The Act also limits attorney's fees. As to amounts payable by the health care provider's insurer, the plaintiff's attorney may charge any percentage to which he and his client agree.¹³⁸ As to amounts received from the patient compensation fund, the plaintiff's attorney may not collect a contingency fee in excess of 15 percent.¹³⁹ However, a contingency fee is not obligatory. The claimant may compensate his attorney on a mutually agreeable per diem basis.¹⁴⁰ The plaintiff's election to pay on a per diem basis rather than on a contingency fee basis must be in writing.¹⁴¹

The Act also contains a special statute of limitations. For claims arising after July 1, 1975, the claimant must commence an action within two years of the negligent act or omission.¹⁴² If the injured patient is a minor below the age of six, he or his representative has until the child's eighth birthday to instigate an action.¹⁴³ No legal disability, besides minority, has any tolling

§ 40:1299.42(B)(1) (\$500,000); Act of July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 52 (West 1975), *to be codified as* WIS. STAT. § 655.27(6) (\$500,000, but only if the commissioner finds that certain conditions exist).

¹³⁸The attorney, however, would be subject to ethical restriction regarding the amount of his fee. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106(A).

¹³⁹IND. CODE § 16-9.5-5-1 (Burns Supp. 1975). Other states have imposed restrictions on attorney fees. Ch. 162, § 13, [1975] Idaho Sess. Laws 422 (40% of the award); Act of June 30, 1975, house file 803, § 25, [1975] IOWA LEGIS. SERV. No. 3, at 327 (West 1975), *amending* IOWA CODE § 147.

¹⁴⁰IND. CODE § 16-9.5-5-1(b) (Burns Supp. 1975).

¹⁴¹*Id.*

¹⁴²*Id.* §§ 16-9.5-3-1, -2. The new medical malpractice statute of limitations is very similar to an older statute of limitations. *Id.* § 34-4-19-1 (Burns 1973). As with the new statute of limitations, the older one also limits the time in which a suit based on medical malpractice may be brought. The only significant differences between the two are that the new statute may protect a more limited group than the older statute since the new statute applies only to "qualified" health care providers, *id.* § 16-9.5-1-5 (Burns Supp. 1975), and the new statute places a time restriction not found in the older statute upon suits based on injuries to minors.

Owing to the degree of similarity between the two statutes, the Indiana courts probably will construe the new statute as they did the old. Therefore, the limitation period under the new statute will not begin until the doctor-patient relationship ends or until the patient discovers or reasonably should have discovered the injury, whichever comes first. As to latent conditions, the limitation period does not begin until the doctor-patient relationship ends because the doctor has a continuing fiduciary duty to apprise the patient of any potential harm caused by the doctor's acts or omissions. After the relationship ends, the duty of disclosure also ends, and the statutory period will begin to run. *Ostojic v. Brueckmann*, 405 F.2d 302 (7th Cir. 1968); *Sheets v. Burman*, 322 F.2d 277 (5th Cir. 1963); *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891 (1956). See Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957).

¹⁴³IND. CODE § 16-9.5-3-1 (Burns Supp. 1975). The tolling of the statute of limitations under the medical malpractice act for injuries occurring before

effect. For acts of malpractice occurring before the effective date, the claimant must bring suit within the longer of two years from the effective date, or the period prescribed for claims arising after the effective date.¹⁴⁴

2. Medical Review Panel

If the claimant is unwilling to settle, his first step under the Act is to obtain an opinion on his claim from a medical review panel.¹⁴⁵ No complaint may be filed in any court of the state until a medical review panel has rendered its opinion.¹⁴⁶ If a physician is one of the defendants, the medical review panel must be composed of three physicians who hold unlimited licenses to practice medicine, and one attorney, who acts solely as a non-voting chairman.¹⁴⁷ Where a nonphysician is the only defendant other than a hospital, two of the panelists must be from the same class of health care providers as the defendant.¹⁴⁸ Each side has the right to select one medical member of the panel. The two

the age of eight limits the effect of section 34-1-2-8 (Burns 1973). This latter section postpones the running of any statute of limitations so long as the claimant is under a legal disability, such as minority. Under the case law prior to the Indiana Supreme Court's decision in *Chaffin v. Nicosia*, 310 N.E.2d 867 (Ind. 1974), discussed in Foust, *Torts, 1974 Survey of Indiana Law*, 8 IND. L. REV. 264, 273-74 (1974), section 34-1-2-8 was inapplicable to the medical malpractice statute of limitations contained in section 34-4-19-1 (Burns 1973). Therefore, the limitation period ran during minority. *Burd v. McCullough*, 217 F.2d 159 (7th Cir. 1954). See also *Guthrie v. Wilson*, 240 Ind. 188, 162 N.E.2d 79 (1959). The supreme court in *Chaffin*, however, changed the law so that minority would toll the statute of limitations. By passing the new statute of limitations, the legislature clearly expressed its intent to nullify the *Chaffin* rule, thereby partially excusing medical malpractice from the provisions of section 34-1-2-8. Exempting medical malpractice, or any other type of action, from the general tolling provision may, however, be constitutionally questionable in Indiana. The supreme court suggested in *Chaffin* that failure to exempt minors from the statute of limitations would violate the Indiana Constitution's guarantee of open courts and redress of grievances. *Chaffin v. Nicosia*, *supra* at 870, citing IND. CONST. art. 1, § 12.

¹⁴⁴IND. CODE § 16-9.5-3-2 (Burns Supp. 1975).

¹⁴⁵*Id.* §§ 16-9.5-9-1 to -10.

¹⁴⁶*Id.* § 16-9.5-9-2. Legislation requiring the claim to be submitted to some type of screening panel is also found in other recent medical malpractice acts. Act of May 20, 1975, ch. 75-9, § 5, [1975] FLA. SESS. LAW SERV. No. 1, at 10-12 (West 1975), to be codified as FLA. STAT. § 768.133; Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1387-89 (West 1975), to be codified as LA. REV. STAT. § 40:1299.47(B); ch. 302, § 6, [1975] Nev. Sess. Laws 409, 410; Act of May 21, 1975, ch. 109, § 11, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 138 (West 1975), to be codified as N.Y. JUDICIARY § 148-a; Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 42-48 (West 1975), to be codified as WIS. STAT. § 655.02-21.

¹⁴⁷IND. CODE § 16-9.5-9-3 (Burns Supp. 1975).

¹⁴⁸*Id.* § 16-9.5-9-3(e).

panelists selected then select the third.¹⁴⁹ All panel members selected must serve unless they are excused by a judge of a court having jurisdiction over the claim.¹⁵⁰ To be excused, the panelist must present the court with an affidavit showing facts which constitute good cause for exclusion.¹⁵¹

The plaintiff begins the selection process by choosing his candidate for the panel. Within 10 days after notification of the proposed panelist, the defendant must make his selection.¹⁵² The parties need not, however, accept their opponent's choice. A challenge without cause within 10 days of any selection will disqualify the proposed panelist.¹⁵³ If one side is challenged twice, the judge appoints three potential panelists and allows each side to strike one.¹⁵⁴ The remaining panelist serves.¹⁵⁵

The procedure for selecting the attorney-chairman is cumbersome. The Act requires the clerk of the Indiana Supreme Court to make a random selection of five attorneys from the roles of the court. Each side may then strike two names;¹⁵⁶ the remaining attorney serves. The Act, however, allows the parties to agree on the attorney-chairman.¹⁵⁷ In light of the complicated alternative means of selection, an agreement is probably the better method.

After the panel is selected, the parties promptly submit their evidence.¹⁵⁸ The evidence may be in written form only, but may include charts, X-rays, lab tests, and excerpts from treatises, as well as the depositions of the parties and witnesses.¹⁵⁹ The panel has the responsibility of obtaining additional information and, if necessary, to consult with other medical experts.¹⁶⁰ The parties are allowed access to any material submitted to the panel.¹⁶¹

Either party, after all the evidence has been submitted, may convene the panel for an informal meeting upon 10 days' notice to the other side.¹⁶² At this meeting, the parties may question the panel members concerning any matter relevant to the issues which

¹⁴⁹*Id.* § 16-9.5-9-3(b).

¹⁵⁰*Id.* § 16-9.5-9-3(f).

¹⁵¹*Id.* § 16-9.5-9-3(g).

¹⁵²*Id.*

¹⁵³*Id.* § 16-9.5-9-3(h).

¹⁵⁴*Id.* § 16-9.5-9-3(g).

¹⁵⁵*Id.*

¹⁵⁶*Id.* § 16-9.5-9-3(d).

¹⁵⁷*Id.*

¹⁵⁸*Id.* § 16-9.5-4-4.

¹⁵⁹*Id.*

¹⁶⁰*Id.* § 16-9.5-9-6.

¹⁶¹*Id.*

¹⁶²*Id.* § 16-9.5-9-5.

the panel may decide.¹⁶³ The panel must render an opinion within 30 days after the parties have presented their evidence and the parties have had the opportunity, if they desire, to question the panel.¹⁶⁴ The Act provides four possible findings which the panel may find separately or in combination:

(a) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.

(b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.

(c) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.

(d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.¹⁶⁵

The panel's findings in no way binds the parties; the claimant may file a subsequent suit regardless of the panel's decision,¹⁶⁶ but the findings can be introduced as an expert opinion in court.¹⁶⁷ In addition, a party may, at his own expense, call any member of the panel as a witness at trial; a panelist so called is required to appear and testify.¹⁶⁸

3. Settlement Procedure

The legislature also provided a detailed settlement procedure for those cases in which the insurer admits liability up to the

¹⁶³*Id.*

¹⁶⁴*Id.* § 16-9.5-9-7.

¹⁶⁵*Id.* The possible findings do not specifically establish a standard applicable to "informed consent" actions. Several states, however, have adopted acts containing such standards. Thus, if the health care provider follows the procedure outlined in the particular act, he will prevent successful suits based on his alleged failure to disclose the risks of and alternatives to a medical procedure. Act of May 20, 1975, ch. 75-9, § 11, [1975] FLA. SESS. LAW SERV. No. 1, at 14 (West 1975), *to be codified as* FLA. STAT. §§ 768.132(3), -(4); Act of June 30, 1975, house file 803, § 17, [1975] IOWA LEGIS. SERV. No. 3, at 325-26 (West 1975), *amending* IOWA CODE § 147; Act of July 29, 1975, No. 798, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1354-55 (West 1975), *to be codified as* LA. REV. STAT. §§ 40:1299.40-.46; ch. 301, §§ 2, 3, [1975] Nev. Sess. Laws 408, 409; Act of May 21, 1975, ch. 109, § 1, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 134-35 (West 1975), *to be codified as* N.Y. PUB. HEALTH LAW § 2805-d.

¹⁶⁶IND. CODE § 16-9.5-9-8 (Burns Supp. 1975).

¹⁶⁷*Id.* § 16-9.5-9-9.

¹⁶⁸*Id.*

policy maximum of \$100,000. The procedure does not apply to any settlement under this maximum; presumably, the legislature did not intend to prescribe the manner in which the insurer and the claimant reach out of court settlements for claims under \$100,000. However, the Act does apply to the two possible situations involving settlements above \$100,000. The procedure applies if the settlement is for an amount above \$100,000 and is agreed upon by the claimant, the insurer, and the commissioner. It also applies if the settlement is agreed upon by the claimant, the insurer, and the commissioner as to the insurer's maximum liability but is disputed as to any additional amount.

All additional payments, up to \$500,000, come from the patient compensation fund after the insurer has admitted liability up to his \$100,000 maximum.¹⁶⁹ If the claimant seeks recovery from the fund, he must file a petition with the court in which the action is pending, or, if no action is pending, with the circuit or superior court of Marion County.¹⁷⁰ Ten days before the filing of the petition, the claimant must serve a copy upon the health care provider, the insurer, and the commissioner.¹⁷¹ If all the parties have agreed to the damages owing the claimant from the patient compensation fund, the petition must be filed to obtain court approval of the agreement.¹⁷² If the parties cannot agree on these damages, the petition must demand payment from the patient compensation fund.¹⁷³ In either case, the complaint must contain sufficient information to put the insurer and the commissioner on notice of the nature and amount of the claim.¹⁷⁴

Even though the insurer admits liability up to the statutory maximum, it still retains the power to approve or reject a settlement that calls for payment from the patient compensation fund. If either the commissioner or insurer objects to the amount of damages sought in the claimant's petition, the court sets the matter for a hearing.¹⁷⁵ Since the insurer has admitted liability up

¹⁶⁹*Id.* § 16-9.5-2-2(c).

¹⁷⁰*Id.* § 16-9.5-4-3(1).

¹⁷¹*Id.* § 16-9.5-4-3(2).

¹⁷²*Id.* § 16-9.5-4-3(3).

¹⁷³*Id.* § 16-9.5-4-3(4).

¹⁷⁴*Id.* § 16-9.5-4-3(2).

¹⁷⁵*Id.* § 16-9.5-4-3(4). The Act is confusing as to the correct procedure to use if the claimant, the insurer, and the commissioner agree on a settlement from the patient compensation fund. Subsection 16-9.5-4-3(4) provides:

The judge of the court in which the petition is filed shall set the petition for *approval* or, if objections have been filed, for *hearing*, as soon as practicable. The court shall give notice of the hearing to the claimant, the insurer of the health care provider and the commissioner.

(Emphasis added).

to the statutory maximum, the liability of the health care provider is taken as established; the court, without a jury, thus needs to decide only the amount of damages owing from the patient compensation fund.¹⁷⁶ If the claimant, the commissioner, and the insurer agree to the amount due from the patient compensation fund, the court sets a hearing to approve the agreement.¹⁷⁷ In this latter case, the parties still may submit evidence to convince the court that the settlement should be approved.¹⁷⁸

Subsection 16-9.5-4-3(5), however, states in part as follows:

At the *hearing* the commissioner, the claimant and the insurer of the health care provider may introduce relevant evidence to enable the court to determine whether or not the petition should be approved if it is submitted on agreement without objections.

(Emphasis added).

Subsection (4) implies that the court has no discretion to exercise if the petition is submitted without objection; subsection (5), on the other hand, expressly grants the court discretion in such an instance. The legislative history indicates that the confusion arose after changes were made in committee in House Bill 1460. The settlement procedure of the Act as contained in the Engrossed House Bill 1460 was unambiguous. If the health care provider and the claimant reached an agreement in excess of the health care provider's maximum liability of \$100,000, the claimant was to file a petition with the court. The commissioner of insurance then was given notice and the opportunity to object to the agreement. Even if the commissioner did not object, a hearing would follow, during which the commissioner and the other parties could introduce evidence. If the court was convinced that the petition should be approved, that the plaintiff probably would recover in excess of \$100,000 at trial, and that the settlement was fair, the court was to enter judgment on the petition.

Interestingly, the Louisiana legislature adopted almost verbatim the chapter of the Indiana act which contained subsection (4) so that a hearing was always held, thereby removing the ambiguity found in the Indiana act. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1385 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.44(C)(4). Based on the legislative history and the Louisiana interpretation of the Indiana act, the construction that the Indiana legislature probably intended is to require a hearing regardless of whether the parties can agree upon the amount owing the claimant from the patient compensation fund.

¹⁷⁶IND. CODE § 16-9.5-4-3(5) (Burns Supp. 1975). The Indiana act, as well as the medical malpractice acts of most other states, keeps the resolution of claims completely within the court system. Louisiana and Michigan, however, have passed legislation designed to remove many malpractice disputes from the courts and place them before arbitrators. Both acts encourage the health care provider to present the patient with an arbitration agreement prior to any professional services. Act of July 17, 1975, No. 371, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 650-52 (West 1975), *to be codified as* LA. REV. STAT. §§ 9:4230-36; Act of July 9, 1975, No. 140, §§ 1-3, [1975] MICH. LEGIS. SERV. No. 3, at 273-80 (West 1975), *to be codified as* MICH. COMP. LAWS §§ 600.5040 to .5065.

¹⁷⁷IND. CODE § 16-9.5-4-3(4) (Burns Supp. 1975).

¹⁷⁸*Id.* § 16-9.5-4-3(5).

4. *Litigation*

If the insurer of the health care provider does not agree to settle at his maximum of \$100,000, the plaintiff may file a complaint in any court having jurisdiction and demand a trial by jury.¹⁷⁹ A plaintiff may not ask for a specific amount of damages in his complaint, but rather may ask only for unspecified damages that "are reasonable under the premises."¹⁸⁰ If the jury awards the claimant an amount in excess of the insurer's maximum liability of \$100,000, the excess is paid from the patient compensation fund up to a maximum total recovery of \$500,000.¹⁸¹ Advance payments made to the claimant by the insurer or the health care provider are not to be construed as an admission of liability.¹⁸² However, if the court renders final judgment for the claimant, the court must reduce the judgment by the amount of the advances.¹⁸³ If more than one defendant is found liable and one of these defendants made advances in excess of his liability, the court must make adjustments to equalize the burdens on the various defendants.¹⁸⁴ In no case, however, must the claimant repay an advance in excess of the final award.¹⁸⁵

5. *Policing the Health Professions*

The Act also formulates a procedure designed to remove incompetent practitioners from the health care professions. Under this procedure, the health care provider or his insurer and the plaintiff's attorney must report to the commissioner within 60 days every malpractice claim, whether settled or adjudicated.¹⁸⁶ The report must inform the commissioner of the nature of the

¹⁷⁹*Id.* § 16-9.5-1-6.

¹⁸⁰*Id.* Several other states also have placed restrictions on the contents of the plaintiff's complaint. Act of May 20, 1975, ch. 75-9, §§ 8, 9, [1975] FLA. SESS. LAW SERV. No. 1, at 13 (West 1975), *to be codified as* FLA. STAT. § 768.042; Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.41(E).

¹⁸¹IND. CODE § 16-9.5-2-2(c) (Burns Supp. 1975).

¹⁸²*Id.* § 16-9.5-2-3.

¹⁸³*Id.* § 16-9.5-2-4.

¹⁸⁴*Id.*

¹⁸⁵*Id.* Other legislatures also have passed provisions for adjusting awards to account for advances made by the health care provider. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.41(D); ch. 298, § 10, [1975] Nev. Sess. Laws 405. Some states, however, go further, reducing awards by the amounts received from collateral sources. Act of May 21, 1975, ch. 109, § 10, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 137-38 (West 1975), *to be codified as* N.Y. CIVIL PRAC. § 4010.

¹⁸⁶IND. CODE § 16-9.5-6-1(c) (Burns Supp. 1975).

claim, the alleged injury, the damages asserted, the attorney fees and other expenses incurred by both sides, and the amount of any settlement.¹⁸⁷ The commissioner, in turn, submits the name of the health care provider to the appropriate professional board.¹⁸⁸ The professional board reviews the health care provider's fitness to continue practice. The board may sanction the health care provider, if necessary, through censure, probation, suspension, or revocation of his license.¹⁸⁹

6. Risk Manager

The Act provides for a "risk manager," an insurance company appointed by the commissioner to provide insurance to those health care providers who are unable to obtain coverage elsewhere.¹⁹⁰ If a health care provider has been rejected by at least two insurers, the health care provider forwards to the risk manager an application for insurance along with proof of the prior rejections.¹⁹¹ The risk manager may either accept or refuse to issue a policy.¹⁹² If the risk manager refuses to insure the applicant, the risk manager must send notice of the rejection to the applicant together with the reason for the rejection.¹⁹³ The applicant then has 10 days to file an appeal with the commissioner, who will review the application and either uphold the risk manager or order that it issue insurance.¹⁹⁴ Awards against the risk manager can be paid only from funds appropriated by the legislature for that purpose or from money generated by premiums.¹⁹⁵ The risk manager's own resources are not liable for any losses.¹⁹⁶

¹⁸⁷*Id.*

¹⁸⁸*Id.* § 16-9.5-6-2(a).

¹⁸⁹*Id.*

¹⁹⁰*Id.* § 16-9.5-8-3.

¹⁹¹*Id.* § 16-9.5-8-6.

¹⁹²*Id.* § 16-9.5-8-7.

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.* § 16-9.5-8-3.

¹⁹⁶*Id.* Louisiana also has adopted the risk manager device to assure insurance coverage for health care providers. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1386-87 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.46. The majority of the states that have attempted to make insurance available to health care providers have adopted the temporary joint underwriting association (JUA) concept. The JUA is a legislatively mandated association of all personal liability insurers operating in a state. The JUA is responsible for underwriting risks that cannot obtain coverage on the voluntary market. *E.g.*, Act of May 21, 1975, ch. 109, § 17, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 140-41 (West 1975), *to be codified as* N.Y. INS. LAW § 682. At least two states have created state-sponsored programs to provide insurance. N.D. CENT. CODE § 26-40-03 (Supp. 1975); Act of May 12, 1975,

7. *Constitutionality*

Health care providers probably will continue to carry unlimited insurance coverage until the courts ultimately decide the Act's constitutionality. This section discusses some of the constitutional issues respecting the Act which may arise in the near future.

The restriction placed upon a claimant's maximum recovery raises one possible constitutional problem. The Act potentially violates the equal protection clause of the fourteenth amendment by establishing a classification between persons injured by medical malpractice, whose potential recovery is statutorily limited, and those injured by all other torts, whose recovery is not limited. Whether any classification meets equal protection standards may depend upon whether the classification discriminates against a suspect class. Where a suspect class is involved, the state bears the burden of proving that a compelling state interest requires that the distinction be made between membership in the affected and unaffected classes.¹⁹⁷ The class of persons injured by medical malpractice, however, does not meet the accepted test for a suspect class, since membership in the class is not immutable, as is race or alienage,¹⁹⁸ nor is the discrimination against the class of long-standing duration.¹⁹⁹

If the class discriminated against is not suspect, the courts apply a much lower level of scrutiny.²⁰⁰ If the low scrutiny standard is used, the party contesting the statute bears the burden of proving that the legislation is arbitrary and without a rational basis.²⁰¹ Since the courts' role in questioning the constitutionality

No. 43, § 1, [1975] MICH. LEGIS. SERV. No. 1, at 90 (West 1975), *to be codified as* MICH. COMP. LAWS § 500.2502.

¹⁹⁷*Frontiero v. Richardson*, 411 U.S. 677 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). See also Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

¹⁹⁸*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1972); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *United States v. Carolend Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

¹⁹⁹*Frontiero v. Richardson*, 411 U.S. 677 (1973); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Indiana High School Athletic Ass'n v. Raike*, 323 N.E.2d 66 (Ind. Ct. App. 1975).

²⁰⁰*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1972); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Indiana High School Athletic Ass'n v. Raike*, 323 N.E.2d 66 (Ind. Ct. App. 1975).

²⁰¹The rational basis test is satisfied if the legislature specifies the interests upon which an act is based. Stroud, *supra* note 197, at 633. In this instance the courts could look to the original version of House Bill 1460, which provides in relevant part:

of legislation is limited under low level scrutiny,²⁰² the probability is low that the courts will find irrational the legislative basis for limiting medical malpractice liability and overturn the Act.

The more crucial issue is whether the Act violates the due process clause of the fourteenth amendment by abrogating a claimant's interest in a common law right without providing a substitute. In upholding a workmen's compensation statute, the United States Supreme Court in *New York Central Railroad Co. v. White*²⁰³ stated in dicta:

The general assembly finds that:

(a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith have increased unreasonably.

(b) The effect of such judgments and settlements, based frequently on now legal precedents, have caused the insurance coverage to uniformly and substantially increase the cost of such insurance coverage.

(c) These increased insurance costs are being passed on to the patient in the form of higher charges for health care service and facilities.

(d) The increased costs of providing health care services, the increased incidents of claims and suits against health care providers, and the unusual size of such claims and judgments, frequently out of proportion to the actual damages sustained, has caused many liability insurance companies to withdraw from the insuring of high risk health care providers.

(e) The rising number of suits and claims is forcing health care providers to practice defensively, viewing each patient as a potential adversary in a lawsuit, to the detriment of both the health care provider and the patient. Health care providers for their own protection, are often required to employ excessive diagnostic procedures for their patients, unnecessarily increasing the cost of patient care.

(f) Another effect of the increase of suits and claims and the costs thereof is that some health care providers decline to provide certain health care services which in themselves entail some risk of patient injury.

(g) The cost and difficulty in obtaining insurance for health care providers discourages young physicians from entering into the practice of medicine in the state of Indiana, resulting in the loss of physicians to other states.

(h) The inability to obtain or the high cost of obtaining insurance affects the medical and hospital services available in the state of Indiana to the detriment of its citizens.

(i) Some health care providers have been forced to curtail the practice of all or a part of their profession because of the non-availability or the high cost of liability insurance.

(j) The cumulative effect of suits and claims is working both to the detriment of the health care providers and to the citizens of this state.

H.R. 1460, 99th Gen. Assembly, 1st Sess. § 1(a)-(j) (1975).

²⁰²See cases cited note 200 *supra*.

²⁰³243 U.S. 188 (1917).

[I]t perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.²⁰⁴

Although dicta, several courts have adopted the *White* rule.²⁰⁵ Even if this rule is applied to the medical malpractice law, the Act may, nevertheless, be constitutional. The General Assembly has not abolished all rights or all defenses in medical malpractice actions; the Act only imposes limits on a claimant's recovery. However, if the claimant must be compensated for the limits placed upon his right of recovery, the Act may not be constitutional since very little is given to the claimant in exchange for this right.²⁰⁶

Even if the substitution provided for the limitation on the claimant's right of recovery is found adequate or unnecessary, the due process clause still requires that the Act not arbitrarily infringe upon a person's interest.²⁰⁷ In addition, if, according to the Supreme Court, the interest is a fundamental interest, the state must show a compelling need to infringe upon it.²⁰⁸ An interest is fundamental if it is "explicitly or implicitly guaranteed by the Constitution."²⁰⁹ A contestant of the Act may attempt to bring within the definition of a fundamental right a claimant's right to receive full recovery for a medical malpractice injury. However, if a court does not find the claimant's right to be fundamental, the court will apply the same low judicial scrutiny used

²⁰⁴*Id.* at 201 (dicta).

²⁰⁵*Kluger v. White*, 281 So. 2d 1 (Fla. 1973); *Manzanares v. Bell*, 214 Kan. 589, 522 P.2d 1291 (1974); *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971); *Montgomery v. Daniels*, 367 N.Y.S.2d 419 (Sup. Ct., Kings County, 1975). *But see Haney v. International Harvester Co.*, 294 Minn. 375, 201 N.W.2d 140 (1972).

²⁰⁶The Act may make expert testimony more available to the plaintiff. Under IND. CODE § 16-9.5-9-9 (Burns Supp. 1975), the medical review panel's findings can be used by the plaintiff at trial as expert opinion. In addition, the same section requires any member of the panel to serve as a witness at trial if called. Although the provisions of section 16-9.5-9-9 apply to both sides of a malpractice suit, the plaintiff probably gains the most since he may use the provisions to overcome the difficulty frequently encountered in obtaining expert testimony from a health care provider against another health care provider.

²⁰⁷*Memorial Hosp. v. Maricopa City*, 415 U.S. 250 (1974); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

²⁰⁸See cases cited note 207 *supra*.

²⁰⁹*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1972).

in equal protection cases to judge the reasonableness of the Act.²¹⁰

If the Act is not found defective under the Federal Constitution, at least one question arises under the Indiana Constitution. The right to trial by jury in civil matters²¹¹ may be violated by Indiana Code section 16-9.5-4-3(5). This section makes the issue of damages a matter for the court in those instances in which the insurer has admitted liability up to the statutory maximum and the insurer, the claimant, and the commissioner of insurance are unable to agree on the additional amount, if any, owing from the patient compensation fund. However, since the Act compensates the claimant for the denial of a jury trial on the issue of damages by establishing the health care provider's liability as a matter of law,²¹² a court may find the trade-off sufficient to overcome the limited violation of the claimant's right.

XIX. Trusts and Decedents' Estates

*Melvin C. Poland**

During the current survey period there were no cases in the trust area and only three in the decedents' estates area considered worthy of comment. The most significant development during the period was the enactment of Public Law 288.¹ A number of the changes made by this legislation are minor and will receive little more than comment in the footnotes. Other changes are quite significant and will be dealt with to the extent space limitations permit.

A. Case Developments

1. Will Contests

In *Haskett v. Haskett*² the principal issue on appeal was whether a petition to determine heirship constituted a will contest

²¹⁰San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972); Indiana High School Athletic Ass'n v. Raike, 323 N.E.2d 66 (Ind. Ct. App. 1975).

²¹¹IND. CONST. art. 1, § 20.

²¹²IND. CODE § 16-9.5-4-3(5) (Burns Supp. 1975).

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¹Ind. Pub. L. No. 288 (Apr. 22, 1975), amending scattered sections of IND. CODE tits. 29, 32. The Act became effective January 1, 1976.

²327 N.E.2d 612 (Ind. Ct. App. 1975).

and thus was subject to the six month limitation period for contesting a will.³ Alleging the statutory grounds,⁴ the plaintiff filed a complaint to contest the will. Plaintiff dismissed the action to contest upon his subsequent filing of a petition to determine heirs.⁵ After a hearing on cross-motions for summary judgment, the trial court found that plaintiff was the son and heir at law of the decedent.⁶ Subsequently, the defendants, legatees under the decedent's will, filed a motion to dismiss the plaintiff's heirship petition, alleging lack of subject matter jurisdiction in that the petition was filed subsequent to the six month limitation on will contests. The court overruled the motion and proceeded to trial on the issue of whether decedent believed the plaintiff to be dead at the time he executed his will, which is a key issue in a pretermitted heirship proceeding. The trial court found for the plaintiff,

³Other issues presented and decided in *Haskett* but not treated in this case survey included the propriety of considering affidavits submitted on motions for summary judgment but not additionally or formally introduced or admitted into evidence, 327 N.E.2d at 617; the admissibility of opinion evidence of a lay witness, *id.* at 618; the sufficiency of the evidence as to acknowledgment by decedent that plaintiff-appellee was his own child as required by IND. CODE § 29-1-2-7(b)(2) (Burns 1972), 327 N.E.2d at 618; and whether at the time decedent executed his will he believed plaintiff-appellee to be dead as required under IND. CODE § 29-1-3-8(b) (Burns 1972) for taking by a pretermitted heir, 327 N.E.2d at 619-20.

The question of the right to share as a pretermitted heir of the decedent arose out of the following uncontested facts and allegations in the petition for determination of heirs. Plaintiff was born some three years prior to decedent's marriage to plaintiff's mother, with his birth certificate stating that decedent was plaintiff's father. The petition to determine heirs alleged that plaintiff was the natural son of the decedent, that decedent had acknowledged his paternity, and finally that decedent believed plaintiff was dead when he executed his will. *Id.* at 613-15.

⁴IND. CODE § 29-1-7-17 (Burns 1972). The statute provided:

Any interested person may contest the validity of any will or resist the probate thereof, at any time within six [6] months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

The section was amended in 1975 to include the new general 5-month probate limitation period. *Id.* § 29-1-7-17 (Burns Supp. 1975).

⁵IND. CODE § 29-1-6-6 (Burns 1972) reads in relevant part:

(a) At any time during the administration of a decedent's estate, the personal representative or any interested person may petition the court to determine the heirs of said decedent and their respective interests in the estate or any part thereof.

⁶327 N.E.2d at 615.

determining that he was an heir at law of the decedent and that the decedent made his will under the belief that the plaintiff was dead and therefore had failed to provide for him.

In affirming the decision of the trial court, the Second District Court of Appeals held that the petition of a pretermitted heir did not constitute a will contest and therefore was not subject to the six month limitation period. Noting that the will contest statute⁷ sets forth only two grounds for contest, unsoundness of mind and undue execution, the court stated that “[c]learly the petition to determine heirship is not built upon such foundations.”⁸

The determination of heirship statute⁹ provides not only for a determination of heirs but also for a determination of their interests in the estate of the decedent. In the case of a pretermitted heir, this could have the effect of removing the heir’s intestate share of the testate property from the estate, with the will remaining operative in all other respects. Since the very purpose of a will contest is to void the will, a petition to determine heirs should not be classed as a complaint to contest the will and therefore subject to the limitation period applicable to a will contest.¹⁰

2. Nonprobate Assets

In 1971 the legislature amended Indiana Code section 32-4-1-1¹¹ to require that certain personal property held in the name

⁷IND. CODE § 29-1-7-17 (Burns 1972). See note 4 *supra*.

⁸327 N.E.2d at 616.

⁹IND. CODE § 29-1-6-6 (Burns 1972). See note 5 *supra*.

¹⁰The court rejected appellants’ alternative contention that the 6-month period of limitation of the will contest statute must be read into the determination of heirship statute under the doctrine of *in pari materia*. The court first noted that the *in pari materia* doctrine, like any other statutory construction doctrine, “is to be used only when the language of the statute is clear and unambiguous” and that there was nothing unclear or ambiguous in the language of Indiana Code section 29-1-6-6, which provides that “at any time during the administration of a decedent’s estate” an interested party may petition for determination of heirship. The court further noted that even if the statutory language was unclear or ambiguous, the doctrine would not apply since the two statutes in question do not have the same purpose, a prerequisite for application of the doctrine. 327 N.E.2d at 617. For a further discussion of the *in pari materia* doctrine see *State v. Gerhart*, 195 Ind. 439, 44 N.E. 469, 33 L.R.A. 313 (1896); *City of Muncie v. Campbell*, 295 N.E.2d 379, 382 (Ind. Ct. App. 1973).

¹¹Before its repeal the section as amended provided in relevant part: Household goods acquired during coverture and in the possession of both husband and wife and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife, shall upon

of both husband and wife should, upon the death of one spouse, become the sole property of the survivor unless a "clear contrary intention is expressed in a written instrument." In *Lester v. Lester*¹² the trial court found that, pursuant to the statute, certain notes and mortgages became the sole property of the decedent's surviving wife. On appeal, the executor of the decedent's estate, appellant in the case, contended that the amended statute did not apply because it became effective after the execution of the decedent's will.¹³ Alternatively, appellant contended that if the statute as amended did apply, the decedent's will, which bequeathed all of his property to his brother, showed the requisite contrary intent.

In affirming the judgment of the lower court, the First District Court of Appeals stated, "It is well settled in Indiana that a will must be construed under the law in effect at the death of the testator."¹⁴ The court rejected the appellant's claim that applying the statute would involve divesting rights vested in the estate. Instead, the court noted that the statute has no effect on the ownership of the personal property and that it sets out specific procedures by which a decedent may express the requisite contrary intention.¹⁵

The appellee, decedent's widow, recognized that, since she had property of her own, the fact that the will left her no property could be interpreted as an indication of a contrary intent; however, she argued that the reference in the will to property of her own could also be interpreted as a reference to the joint property in question. Appellee further argued that the fact she was not to take anything under the will did not preclude taking property passing outside the will.¹⁶ On the basis of the language and possible interpretations of the will, it appears the court of appeals correctly concluded the will did not express the "clear contrary intent" required by the statute.

During the 1975 General Assembly an attempt was made to enact the Multi-Party Accounts provisions of the Uniform Probate Code¹⁷ in lieu of Indiana Code section 32-4-1-1. The UPC provisions are more narrow in that the property subject to such

the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument. Ch. 145, § 1, [1971] Ind. Act 383 (repealed 1975, effective Jan. 1, 1976).

¹²313 N.E.2d 357 (Ind. Ct. App. 1974).

¹³The decedent's will was executed July 23, 1971, and the amendment to section 32-4-1-1 became effective June 15, 1971.

¹⁴313 N.E.2d at 358, citing *Hayes v. Martz*, 173 Ind. 279, 90 N.E. 309 (1910).

¹⁵313 N.E.2d at 358.

¹⁶*Id.* at 359.

¹⁷UNIFORM PROBATE CODE §§ 6-101 to -113, 6-201.

survivorship construction is limited to accounts in financial institutions. Although the General Assembly failed to enact this legislation, they did repeal section 32-4-1-1, effective January 1, 1976.¹⁸ The effect of this repeal is to leave Indiana without a statute as to any jointly held personal property. Presumably, this would mean a return to the common law, which preferred joint tenancy with right of survivorship in the absence of a contrary intention.¹⁹

3. *Equitable Adoption*

A number of jurisdictions have permitted a foster child who was never legally adopted to participate in the estate of his foster parent under the doctrine of equitable adoption.²⁰ In those jurisdictions, when the facts are sufficient to bring a case within the scope of the doctrine, the "equitably adopted" child receives a share of the estate equal to that of a legitimate or legally adopted child. A lesser number of jurisdictions follow the rule that nothing less than strict compliance with the statutory adoption scheme will entitle a foster child to an intestate share of his foster parents' estates.²¹ In general, the justification for this strict interpretation is that adoption statutes are in derogation of the common law and therefore they must be strictly construed.²²

In the jurisdictions recognizing the equitable adoption doctrine, the most common theory upon which recovery is allowed is specific performance of an express unperformed contract for adoption between the foster parents and the child, his natural parents, or someone standing *in loco parentis*.²³ However, specific performance has also been recognized where the adoption contract is implied from the "acts, conduct, and admissions of the parties."²⁴

¹⁸Ind. Pub. L. No. 288, § 51 (Apr. 22, 1975), *repealing inter alia* IND. CODE § 32-4-1-1 (Burns 1972).

¹⁹4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1775 (J. Grimes, 1961 repl.).

²⁰This doctrine, also referred to as adoption by estoppel, has been accepted by a majority of the states. As of 1972 twenty-six states have demonstrated a willingness to go beyond the statutory scheme of adoption. See Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727, 728 n.10 (1972) (listing the cases accepting the doctrine).

²¹As of 1972 eight states had refused to go beyond the statutory adoption scheme, rejecting recovery based upon an unperformed contract to adopt. *Id.* at 727.

²²*Id.* at 727-28.

²³*Id.* at 727, 730-32. It must be recognized, however, that the contract to adopt is not in fact being specifically enforced. Recovery under an equitable adoption theory results only in the child being made an heir for purposes of inheritance from the decedent.

²⁴*In re Lamfrom's Estate*, 90 Ariz. 363, 367, 368 P.2d 318, 321 (1962) (en banc). Elaborating on the principle of equitable adoption, the Supreme Court of Arizona stated:

Another theory upon which equitable relief is given to children not legally adopted is that of estoppel. Under this theory the adoptive parents are precluded from asserting the invalidity of adoptive status after performance on the part of the adoptive child under a mistaken belief that legal adoption existed.²⁵

In a case of first impression in Indiana, the First District Court of Appeals in *In re Estate of Fox*²⁶ appears to have rejected the doctrine of equitable adoption. The court noted that the case contained two issues: whether the doctrine of equitable adoption should be recognized and whether the facts warranted a finding that the petitioner was an heir of the decedent. As to the first issue, the court stated that the longstanding laws of descent and distribution based upon "the traditional relationships of blood, marriage, or adoption" had "worked well" and were "quite adequate."²⁷ Presumably, the court's reference to "adoption" was to legal adoption. The remainder of the opinion dealt with the "more practical considerations of the merits of this individual case," that is, the amount of proof necessary to support a claim of equitable adoption.²⁸

The burden of proof in an equitable adoption case is generally stated to be "clear, cogent, and convincing."²⁹ In *Fox* the court

This court has in two instances recognized the widely held doctrine of equitable adoption, and laid down the following principles: (1) the promisor must promise in writing or orally to adopt the child; (2) the consideration flowing to the promisor must be twofold: (a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association, and obedience to the promisor during the latter's lifetime; (3) when upon the death of the promisor the child has not been made the legally adopted child of the promisor, equity will decree that to be done which was intended to be done and specifically enforce the contract to adopt; (4) the child will be entitled to inherit that portion of the promisor's estate which he would have inherited had the adoption been formal. Furthermore it has been held in other jurisdictions that the contract to adopt need not be express, but may be implied from the acts, conduct, and admissions of the adopting parties.

Id.

²⁵See *Jones v. Guy*, 135 Tex. 398, 402, 143 S.W.2d 906, 908 (1940). Space will not permit further discussion of the theories upon which equitable adoption rests or the merits of such theories. For further discussion of the doctrine of equitable adoption see Comment, *Equitable Adoption: A Necessary Doctrine?*, 35 S. CAL. L. REV. 491 (1962); Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727 (1972).

²⁶328 N.E.2d 224 (Ind. Ct. App. 1975).

²⁷*Id.* at 225.

²⁸*Id.*

²⁹*In re Lamfrom's Estate*, 90 Ariz. 363, 368 P.2d 318 (1962) (en blanc); *Wilks v. Langley*, 248 Ark. 227, 451 S.W.2d 209 (1970); *Long v. Willey*, 391

noted that there was a lack of evidence of an intent on the part of the decedent and her husband to adopt the petitioner. Moreover, there was no record evidence of any communication regarding any adoption agreement between the Foxes and petitioner's natural parents, nor was there any evidence of adoption proceedings, attempted or completed. Consequently, the appellate court affirmed the decision of the trial court denying the petition to be declared an heir. Since the decision rested primarily on the insufficiency of the facts to support the claim of equitable adoption, one can only speculate as to the result had there been clear and convincing evidence of a contract to adopt. In light of the fact the court felt the need to discuss the proof necessary to establish equitable adoption, it would appear the existence of the doctrine of equitable adoption in Indiana thus remains open to question.

B. Legislative Developments

Changes in probate law have been slow, with the first major effort beginning in the early 1940's and culminating with the publication of the Model Probate Code³⁰ in 1946. Since its approval by the Real Property, Probate and Trust Law Section of the American Bar Association in 1946, various provisions of the Model Code have been adopted or served as a pattern for major revision of probate laws in a number of states. The Indiana Probate Code of 1953, although modifying many of its provisions and adding other provisions unrelated to it, clearly was an attempt to conform to the Model Code.³¹ Although a degree of uniformity could have been achieved by close conformity with and widespread adoption of the Model Code provisions, it was not conceived as a uniform code.³² The promulgation of a Uniform Probate Code was the

S.W.2d 301 (Mo. 1965); *Nichols v. Pangarova*, 443 P.2d 756 (Wyo. 1970). In *Long* the Supreme Court of Missouri said:

The claimant, or person seeking the decree of equitable adoption, has the burden of proving the adoption contract, and it has been said that the evidence must be examined with "special strictness," and that it must be so clear, cogent, and convincing as to leave "no reasonable doubt" in the chancellor's mind.

Long v. Willey, *supra* at 304-05 (citations omitted).

³⁰The Model Probate Code was a project of a special committee of the Probate Law Division of the Real Property, Probate and Trust Law Section of the American Bar Association in cooperation with the research department of the University of Michigan Law School. See generally Simes, *The Indiana Probate Code and the Model Probate Code: A Comparison*, 29 IND. L.J. 342 (1954); Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636, 637 (1970).

³¹Simes, *supra* note 30, at 342. This article presents an excellent comparison of the Model Code and the 1953 Indiana Probate Code.

³²Wellman, *supra* note 30, at 637.

product of a continuing effort on the part of the Real Property, Probate and Trust Section to revise the earlier work and to encourage wider statutory recognition of its provisions. This work began in 1962 and culminated in 1969 with approval of the Uniform Probate Code (UPC) by the House of Delegates of the American Bar Association.³³ Several states have adopted the UPC with modification.³⁴

Having enacted a new probate code as late as 1953, one can, to some extent, understand the lack of enthusiasm on the part of the Indiana legislature and the Indiana bar for another major revision of or a completely new probate code. On the other hand, when in 1974 each member of the Indiana Probate Code Study Commission "agreed to read, examine and study all of the Uniform Probate Code and the comments for each section,"³⁵ one cannot help but express disappointment that so few of the UPC provisions found their way into the recommendations of the Commission in the Probate Reform Act of 1975, and subsequently into Public Law 288.³⁶ However, the new law made a number of both major and minor changes in existing Indiana probate law. One change, which may prove to be the most significant if received favorably by the courts, is that of unsupervised administration.³⁷ Other significant changes were made in respect to family protection statutes (homestead and family allowances),³⁸ renuncia-

³³The Uniform Probate Code (UPC) was sponsored by the National Conference of Commissioners on Uniform State Laws in cooperation with the Real Property, Probate and Trust Law Section of the American Bar Association.

³⁴ALASKA STAT. §§ 13.06.005 to 13.36.100 (1972); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (Special Pamphlet 1974); COLO. REV. STAT. ANN. §§ 15-3-1-101 to -8-102 (1974); FLA. STAT. §§ 731.01 to 735.302 (1974) (adopting the major provisions of the UPC, with several variations, omissions, and additions); IDAHO CODE §§ 15-1-101 to -7-307 (Supp. 1975); MINN. STAT. ANN. §§ 524.1-101 to 524.8-103 (Supp. 1975); MONT. REV. CODE ANN. §§ 91A-1-101 to -6-104 (Supp. 1975); L.B. No. 354, §§ 1 *et seq.*, [1974] NEB. LAWS 130 (effective Jan. 1, 1977); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (Special Supp. 1975); S.D. UNIFORM PROBATE CODE (1974). Although New Jersey has not adopted the Uniform Probate Code, it has substantially adopted sections 2-110, 5-501, and 5-502. N.J. STAT. ANN. §§ 3A:4-8 (Supp. 1975), 46:2B-8 (Supp. 1975), 46:2B-9 (Supp. 1975).

³⁵McGillf, *Preface*, INDIANA PROBATE CODE STUDY COMMISSION IN THE PROBATE REFORM ACT OF 1975 PROPOSED FINAL DRAFT iv (1974).

³⁶Ind. Pub. L. No. 288 (Apr. 22, 1975), *amending* scattered sections of IND. CODE tits. 29, 32.

³⁷IND. CODE §§ 29-1-7.5-1 to -8 (Burns Supp. 1975). *See* text accompanying notes 69-98 *infra*.

³⁸IND. CODE § 29-1-4-1 (Burns Supp. 1975). *See* text accompanying notes 54-59 *infra*.

tion,³⁹ and self-proved wills.⁴⁰ A number of amendments to the Probate Code are designed to expedite administration by reducing the time allowed for will contests,⁴¹ notice of appointment,⁴² and filing and allowance of claims.⁴³ In addition to unsupervised administration, other provisions of the Act will also have the effect of minimizing the expenses of administration. The bond requirement for personal representatives is eliminated.⁴⁴ Inventory requirements have been modified so as to eliminate the need for the filing of a verified written appraisal of the decedent's property.⁴⁵ Another change implemented by the Act reduces the number of filings of final distribution decrees of real property.⁴⁶ Changes designed to give more flexibility in the administration of small estates⁴⁷ and in summary administrative procedures⁴⁸ also appear in the new law. Other changes, including those related to ancillary administration,⁴⁹ will not be treated in this survey.

³⁹IND. CODE § 29-1-5-3 (Burns Supp. 1975). See text accompanying notes 50-53 *infra*.

⁴⁰IND. CODE § 29-1-5-3 (Burns Supp. 1975). See text accompanying notes 50-53 *infra*.

⁴¹IND. CODE § 29-1-7-17 (Burns Supp. 1975). This section reduces the period for will contests on resisting probate from 6 to 5 months.

⁴²*Id.* § 29-1-7-7 (Burns Supp. 1975). This section reduces the period for notice of appointment after letters testamentary or letters of administration, special or general, are issued from the former 3-week period to a 2-week period. Thus, under the new statute, such notice must be published once a week for two consecutive weeks.

⁴³*Id.* §§ 29-1-14-1, -2, -8, -9, -10, -16, -18, -19, -21 (Burns Supp. 1975). These sections primarily implement the new 5-month period for filing claims against estates. Additionally, the sections also restrict complaint and enforcement of tort claims against a deceased tortfeasor in negligence actions for personal injury or property damage.

⁴⁴*Id.* § 29-1-11-1 (Burns Supp. 1975). See text accompanying notes 99-100 *infra*.

⁴⁵IND. CODE §§ 29-1-12-1, -3 (Burns Supp. 1975). See text accompanying notes 101-104 *infra*.

⁴⁶IND. CODE § 29-1-17-2 (Burns Supp. 1975). This section eliminates the necessity of recording the decree of final distribution of real property in the county where the estate is administered. The decree must still be recorded in every other county in which real estate affected by the decree is situated.

⁴⁷*Id.* §§ 29-1-8-1, -2 (Burns Supp. 1975). These sections reword the former sections concerning dispensing with administration of small estates. Under the new law, administration may be dispensed with where the value of the gross probate estate less liens and encumbrances does not exceed \$8,500. Formerly, administration could be dispensed with where the value of the gross probate estate less liens and encumbrances did not exceed \$5,000.

⁴⁸*Id.* §§ 29-1-8-3, -4 (Burns Supp. 1975). These sections broaden the scope and simplify the procedures of summary administration of decedents' estates.

⁴⁹*Id.* §§ 29-2-1-1 to -17 (Burns Supp. 1975).

1. *Self-proved Wills*

The purpose of a self-proved will is that of admission to probate without the necessity of testimony of the subscribing witnesses.⁵⁰ Execution pursuant to the requirements of a self-proved will provision could save time and expense in administering an estate. Indiana Code section 29-1-5-3, which sets forth the formal requirements for execution of a will, was amended by the Act to provide for the self-proved will. The amendment adds subsection (b), which, in effect, provides under penalty of perjury for acknowledgement by the testator and verification by the witnesses that the will was executed with the formalities prescribed in subsection (a).⁵¹ Other than its admission without testimony of subscribing witnesses, the will is treated the same as any other will. It may be contested on any of the recognized grounds for contesting wills⁵² except signature requirements. Further, the self-proving provision does not affect the right of the testator to amend or revoke the will.⁵³

⁵⁰UNIFORM PROBATE CODE § 2-504, Comment.

⁵¹IND. CODE § 29-1-5-3(b) (Burns Supp. 1975).

An attested will may at the time of the execution or at any subsequent date be made self-proved, by the acknowledgment of the will by the testator and the verifications of the witnesses, each made under the laws of Indiana, and evidenced by the signatures of the testator and witnesses, attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, We,

-----, -----, and
-----, the testator and the witnesses
respectively, whose names are signed to the attached or foregoing
instrument declare:

- (1) that the testator executed the instrument as his will;
- (2) that, in the presence of both witnesses, he signed or acknowledged his signature already made or directed another to sign for him in his presence;
- (3) that he executed the will as his free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witnesses;
- (5) that the testator was of sound mind; and
- (6) that to the best of his knowledge the testator was at the time eighteen [18] or more years of age, or was a member of the armed forces or of the merchant marine of the United States, or its allies.

Testator

Date

Witness

Witness

⁵²*Id.* § 29-1-7-17 (Burns Supp. 1975).

⁵³*See* UNIFORM PROBATE CODE § 2-504, Comment.

2. Homestead, Widow's, and Family Allowances

The Act provides a new family protection statute,⁵⁴ superseding not only the homestead allowance but also the widow's and family allowances available under prior statutes.⁵⁵ The new law provides for an allowance of \$8,500 in personal property for the surviving spouse. If there is no surviving spouse, the dependent children are entitled to the allowance. If the personal estate is insufficient to pay the allowance in full, the balance may be made up out of real estate, the difference constituting a lien on the real estate. The new statute also provides that "an allowance under this section is not chargeable against the distributive shares of either the surviving spouse or the children."⁵⁶

It should be noted the new statute grants the allowance to the "surviving spouse." Of the three statutes which it supersedes, only the homestead allowance was available to both husband and wife.⁵⁷ This rent-free occupancy of the ordinary dwelling house granted to the surviving spouse or children under the old homestead allowance was of limited value in most instances for two reasons. First, the right was limited to a period of one year or until the final decree of distribution, whichever occurred first. Secondly, recognition of tenancy by the entirety in all real property held jointly by husband and wife⁵⁸ would without the benefit of the statute in the majority of cases vest title to the dwelling house in the surviving spouse. Also, the \$3,000 allowance granted by the repealed Indiana Code section 29-1-4-2 was limited to the surviving "widow" as was the court allowance of \$50 per week in repealed Indiana Code section 29-1-4-3, which allowance was subject to the sound discretion of the court.

Therefore, in most cases the \$8,500 allowance under the new statute should prove more beneficial than the cumulative benefit of the three former family protection statutes, not only to the

⁵⁴IND. CODE § 29-1-4-1 (Burns Supp. 1975).

⁵⁵P.L. 403, § 1, [1971] Ind. Acts 1892 (repealed 1975) (widow's allowance); P.L. 287, § 3, [1973] Ind. Acts 1533 (repealed 1975) (family allowance).

⁵⁶The allowance under the new statute has the priority of a debt of a decedent, constituting a lawful claim against the estate. It is superior to all claims except costs and expenses of administration and reasonable funeral expenses. IND. CODE § 29-1-14-9 (Burns Supp. 1975).

⁵⁷Ind. Pub. L. No. 287, § 2 (Apr. 14, 1973), *as amended* IND. CODE § 29-1-4-1 (Burns Supp. 1975).

⁵⁸*Simons v. Bollinger*, 154 Ind. 83, 63 N.E. 28, 48 L.R.A. 234 (1900); *Chandler v. Chaney*, 37 Ind. 391 (1871); *Richards v. Richards*, 60 Ind. App. 34, 110 N.E. 103 (1915).

surviving husband but to the surviving wife and dependent children as well.⁵⁹

3. Renunciation

The Act amended the present renunciation statute⁶⁰ by substituting section 2-801 of the UPC with a modification as to the time period for filing a renunciation.⁶¹ In certain important aspects the amendment does not change the law. Both the prior and the amended renunciation statutes authorize the devisees under a will and the heirs taking under the succession laws⁶² to renounce in whole or in part.⁶³ There are, however, some important changes. The former law limited the right of renunciation to an heir or "devisee"; the new provision extends the right to "an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument."⁶⁴

Also, the previous law provided that the renunciation could be defeated by a creditor of the heir or devisee if objected to within 30 days and if the court found that the creditor was prejudiced thereby.⁶⁵ No such right is given to creditors in the amended statute, and it must be assumed that no such right exists under the new Act. This conclusion is supported by the

⁵⁹One could imagine a situation in which the surviving wife or minor children might receive more under pre-Act law. For example, a husband dies leaving a wife and four dependent children. Assume that the husband held title to a dwelling house in his name, making disposition of it under his will in such manner that the wife would have no interest in the house. Further assume that she could not afford to elect against the will.

Rental value of home at \$250 per month for one	
year under 29-1-4-1	= \$ 3,000
Widow's allowance under 29-1-4-2	= 3,000
Allowance of \$50 per week under 29-1-4-3	= 2,500
Allowance of \$25 per week for each of 4 children	
under 29-1-43-3	= 5,000
Total	<u>\$13,500</u>

⁶⁰IND. CODE § 29-1-6-4 (Burns 1972), *as amended id.* § 29-1-6-4 (Burns Supp. 1975).

⁶¹*Id.* § 29-1-6-4 (Burns Supp. 1975).

⁶²At common law an heir could not renounce, title having vested in the heir by operation of law rather than by "gift" under a will. *In re Meyer's Estate*, 107 Cal. App. 2d 279, 238 P.2d 597 (1951); *Coomes v. Finnegan*, 233 Iowa 448, 7 N.W.2d 729 (1943); 2 J. GRIMES, HENRY'S PROBATE LAW AND PRACTICE ch. 26, § 11 (6th ed. 1954).

⁶³*Compare* IND. CODE § 29-1-6-4 (Burns 1972), *with id.* § 29-1-6-4(a) (Burns Supp. 1975).

⁶⁴*Id.* § 29-1-6-4 (Burns Supp. 1975).

⁶⁵*Id.* § 29-1-6-4 (Burns 1972).

language of the statute which provides that the "renunciation relates back for all purposes to the date of death of the decedent or the donee," and the property, unless the decedent or donee has otherwise indicated in his will, is to pass as if the person renouncing had predeceased the decedent or donee as the case may be.⁶⁶

Omitted from the amended statute is the provision that "succession so renounced shall be subject to the same Indiana inheritance tax that would have been assessed if there were no renunciation."⁶⁷ Under the old law, renunciation by one subject to a higher inheritance tax than the person taking after renunciation still subjected the inheritance to the higher tax. If one applies the same language regarding the time of taking after a renunciation as set forth above in the discussion on the rights of creditors, there would appear to be no justification for imposing the higher tax under the amended statute.

Under the former law an heir or devisee was given 3 months from the date of appointment of the personal representative to file a renunciation. Under subsection (b) of the amended renunciation statute, the period for filing a renunciation is 5 months from the date of death of the decedent. However, if the taker of the property is not ascertainable within the 5-month period, then the renunciation must be filed within 4 months after such taker is finally ascertained.⁶⁸

4. *Unsupervised Administration*

The extent of court supervision and control over the administration of a decedent's estate varies materially from state to state.⁶⁹ The traditional approach has been one of substantial court supervision and control beginning with probate or the appointment of a personal representative and continuing through closing

⁶⁶*Id.* § 29-1-6-4(c) (Burns Supp. 1975).

⁶⁷*Compare* IND. CODE § 29-1-6-4 (Burns 1972), *with id.* § 29-1-6-4 (Burns Supp. 1975).

⁶⁸*Id.* § 29-1-6-4(b) (Burns Supp. 1975). There are a number of other provisions of this statute which are not discussed in this survey because of space limitations. For example, the amended statute sets forth where and when the instrument of renunciation is to be filed, *id.*; what will constitute a waiver or bar of the right of renunciation, *id.* § 29-1-6-4(d); the effect of spendthrift provisions, *id.* § 29-1-6-4(e), and the effect on interests existing on January 1, 1976, *id.* § 29-1-6-4(g).

⁶⁹For a good discussion of the state of the law in 1968 see Committee on Administration and Distribution of Decedents Estates, *Estate Administration: Current Practices and Proposed Uniform Probate Code*, 3 REAL PROPERTY, PROBATE & TRUST J. 143 (1968). See also Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970).

and distribution.⁷⁰ Supervised administration involves a single continuous proceeding before the court concerned with the administration and settlement of a decedent's estate.⁷¹

Article 3 of the UPC is designed to offer survivors—heirs and devisees—a number of alternative methods for settling inheritances, including unsupervised administration.⁷² Admittedly, some of the methods involve risks,⁷³ but the risks can be minimized with competent counseling while affording survivors a greater voice in the settlement of a decedent's estate.⁷⁴

Prior to the Act, Indiana law provided a measure of flexibility in the administration and settlement of a decedent's estate.⁷⁵

⁷⁰Wellman, *supra* note 69, at 453-56.

⁷¹UNIFORM PROBATE CODE § 3-501 & Comment; UNIFORM PROBATE CODE PRACTICE MANUAL § 9.1 (R. Wright ed. 1972); Averill, *An Introduction to the Administration of Decedents' Estates Under the Uniform Code*, 20 S.D.L. REV. 265, 280 (1975).

⁷²For a complete summary of the choices available under Article 3 of the UPC see UNIFORM PROBATE CODE PRACTICE MANUAL §§ 6.1-6.14 (R. Wright ed. 1953). As to Article 3 of the UPC, one writer stated:

In a nutshell the philosophy of Article III of the code is that the transfer of property at death, whether in large amounts or small, the paying of the debts and the determination of and payment of the tax liabilities of the decedent, and the handling of all other matters associated with the transfer, is largely an administrative procedure; thus, the role of the courts in this area is passive. When irreconcilable disputes arise during the source of this administrative venture, such as disagreements concerning the priority of claims of the determination of heirship, the procedure loses its administrative flavor and becomes adversary and resort is had to the courts for decisions. At this point, for the first time, the courts' role becomes active.

If this philosophical and yet very real premise is accepted, lawyers handling decedents' estates readily conclude that most wills can be probated and most estates administered on an informal basis without any court supervision. When problems arise that cannot be resolved between the parties in disagreement, court intervention then becomes necessary to solve or eliminate the problem.

Limbaugh, *Probate and Administration Under the Uniform Probate Code*, 29 J. Mo. B. 430 (1973).

⁷³UNIFORM PROBATE CODE PRACTICE MANUAL §§ 6.4, 6.10 (R. Wright, ed. 1972).

⁷⁴In many instances the risks will be minimal or nonexistent. *Id.* § 6.13. However, the role of the lawyer may shift from one of guiding the estate through the formal procedures of traditional administration to one of counseling survivors as to the appropriate method to avoid the pitfalls of a wrong choice in the settlement of the estate.

⁷⁵Both formal (with notice) and informal (without notice) probate or appointment of personal representatives in intestate estates was recognized prior to the Reform Act. IND. CODE §§ 29-1-7-4, -16, -17 (Burns 1972). Pre-Act law also provided for the collection of small estates through affidavits, *id.* §§ 29-1-8-1, -2 (Burns 1972), *as amended id.* §§ 29-1-8-1, -2 (Burns Supp. 1975); elimination of administration, *id.* §§ 29-1-8-3, -4 (Burns 1972), *as*

However, except as supervised administration was avoided through affidavit procedures in small estates, supervised administration was the rule under the pre-Act Probate Code.⁷⁶ As of January 1, 1976, an Indiana court may permit administration of a decedent's estate without supervision.⁷⁷ Unsupervised administration is permitted only upon petition⁷⁸ and a granting of the petition by the court.⁷⁹ Persons who may file a petition for unsupervised administration are as follows: (1) The decedent's heirs at law if the decedent died intestate, (2) the legatees and devisees under a will, or (3) the personal representative.⁸⁰ Notice of a petition for unsupervised administration must be given to a decedent's creditors pursuant to Indiana Code section 29-1-7-7.⁸¹ The court may grant the petition only if all of the following conditions are met:

- (1) All of the persons referred to in clause 1 or 2 of section 1 . . . have joined in the petition; (2) the estate is solvent; (3) the personal representative is qualified to administer the estate without court supervision; (4) the heirs, or legatees and devisees, as the case may be, freely consent to and understand the significance of administration without court supervision; and (5) the will does not request supervised administration.⁸²

amended id. §§ 29-1-8-3, -4 (Burns Supp. 1975); and summary proceedings for insolvent estates, *id.* § 29-1-8-8 (Burns 1972), *as amended id.* § 29-1-8-8 (Burns Supp. 1975).

⁷⁶Among others, the following provisions evidence the extent of court supervision of administration in Indiana under pre-Act law: Formal notice requirements must be fulfilled, IND. CODE § 29-1-7-7 (Burns 1972), *as amended id.* § 29-1-7-7 (Burns Supp. 1975); *id.* § 29-1-7-18 (Burns 1972); *id.* § 29-1-17-2(a) (Burns 1972), *as amended id.* § 29-1-17-2(a) (Burns Supp. 1975); the requirements of a verified inventory and appraisal, *id.* § 29-1-14-3 (Burns 1972); approval of investment of funds of the estate, *id.* § 29-1-13-14 (Burns 1972); and approval in both partial and final distribution, *id.* §§ 29-1-17-1, -2 (Burns 1972).

⁷⁷IND. CODE §§ 29-1-7.5-1 to -8 (Burns Supp. 1975) (the new chapter is entitled "Unsupervised Administration"). For those who consider unsupervised administration novel or revolutionary, it should be noted that unsupervised administration has been a part of Texas probate law since 1843, when Texas was an independent republic. See Marshall, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95 (1955); Woodward, *Independent Administration Under the New Texas Probate Code*, 34 TEXAS L. REV. 687 (1956). Unsupervised administration has also been a part of the probate law of the State of Washington since 1868. WASH. REV. CODE ANN. §§ 11.68.010 to 11.68.120 (Supp. 1974).

⁷⁸IND. CODE § 29-1-7.5-1(a) (Burns Supp. 1975).

⁷⁹*Id.* §§ 29-1-7.5-1, -2.

⁸⁰*Id.* § 29-1-7.5-1(a).

⁸¹*Id.* § 29-1-7.5-1(b).

⁸²*Id.* § 29-1-7.5-2(a).

In providing for unsupervised administration pursuant to the provisions and conditions just stated rather than amending the Code to accommodate Article 3 of the UPC, the legislature established a procedure that will save time and expense, but the effectiveness of unsupervised administration may be seriously impaired.⁶³ Under the UPC unsupervised administration is the rule, with supervised administration occurring only when a petition requesting it is filed.⁶⁴ Furthermore, where an estate is being administered without supervision and formal orders of the court become necessary, each formal proceeding is independent of all others.⁶⁵ Thus, under the UPC, unsupervised administration will continue after a formal order of the court except in the case of a formal order for supervised administration. Under the new Indiana provisions for unsupervised administration, however, the only procedure provided for when a formal court order is necessary during an unsupervised administration is a revocation of the order for unsupervised administration.⁶⁶ If the estate is to be administered thereafter as unsupervised, it appears that a subsequent petition for unsupervised administration would have to be filed and approved by the court.⁶⁷ Presumably, this would require an additional notice to creditors.⁶⁸ At best, such a procedure is cumbersome; at worst, it is time consuming and expensive.

Another disadvantage of requiring a petition for unsupervised administration rather than for supervised administration as under the UPC is demonstrated by the fourth prerequisite for granting

⁶³The Probate Code Study Commission noted that the purpose of the chapter on unsupervised administration and the method adopted for accomplishing that purpose was that of providing an "alternative to the existing method of administering estates" by engrafting "upon the existing Code those provisions of the Uniform Probate Code as would provide such an alternative without substantially revising large areas of the present Code." INDIANA PROBATE CODE STUDY COMMISSION IN THE PROBATE REFORM ACT OF 1975, PROPOSED FINAL DRAFT 14 (1974).

⁶⁴UNIFORM PROBATE CODE § 3-502.

⁶⁵*Id.* § 3-107.

⁶⁶IND. CODE § 29-1-7.5-2(b) (Burns Supp. 1975) provides:

The court may, on its own motion or the motion of an interested person, revoke an order of unsupervised administration and require an administration on terms and conditions which the court specifies if the court finds that such a revocation is in the best interests of the estate, creditors, taxing authorities, heirs, legatees, or devisees.

⁶⁷*Id.* § 29-1-7.5-1(a) provides in part:

Upon the filing of a petition under IC 1971, 29-1-7-5, the following persons may *at any time* petition the court for authority to have a decedent's estate administered without court supervision

(Emphasis added).

⁶⁸Subsection 29-1-7.5-1(b) provides for notice to creditors of petitions for unsupervised administration and does not appear to waive the requirement in case of a second petition in proceedings for the same estate.

unsupervised administration—the requirement of consent. While it may be possible to obtain the consent of all the heirs, devisees, or legatees, there remains the question of what will suffice as an understanding of “the significance of administration without court supervision.” Also, if any of the heirs, legatees, or devisees are minors, and thus cannot give consent, it would appear unsupervised administration has been precluded.

Once unsupervised administration has been granted, the power of the personal representative is as extensive as the power of the personal representative in a supervised administration.⁸⁹ In fact, new Indiana Code section 29-1-7.5-3⁹⁰ sets forth 28 activities and functions which the personal representative may perform without court order, including any act necessary or appropriate to the administration of an estate, so as long as the order of unsupervised administration remains unrevoked. Since no change was made in the existing law relative to the filing of claims against the estate, creditors of the decedent will continue to file claims in the court issuing letters and such claims will be processed in the same manner and subject to the same limitations as in the supervised administration.⁹¹

Unsupervised estates may be closed at any time after 5 months from the date of the original appointment of the personal representative by the filing of a verified closing statement.⁹² The

⁸⁹Stated another way, “the fact that the proceeding is supervised neither limits nor increases the power of the personal representative.” *UNIFORM PROBATE CODE PRACTICE MANUAL* § 9.1 (R. Wright ed. 1972).

⁹⁰This section was patterned after Uniform Probate Code section 3-715.

⁹¹INDIANA PROBATE CODE STUDY COMMISSION IN THE PROBATE REFORM ACT OF 1975, PROPOSED FINAL DRAFT 14-15 (1974).

⁹²IND. CODE § 29-1-7.5-4(a) (Burns Supp. 1975). This section requires a verified statement that the personal representative has done the following:

(1) published notice to creditors as provided in IC 1971, 29-1-7-7 and that the first publication occurred more than five [5] months prior to the date of the statement;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities; and

(3) sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he has actual knowledge whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

estate may then be closed 3 months after the closing statement is filed if no proceedings involving the personal representative are pending in court. Upon closing the estate, the appointment of the personal representative terminates.⁹³

Claims against the personal representative, except those based upon fraud, misrepresentation, or inadequate disclosure related to settlement of the estate, are barred within 3 months after the closing statement is filed unless a proceeding to assert these claims is pending.⁹⁴

After the estate has been distributed, "undischarged claims not barred may be prosecuted against one or more distributees."⁹⁵ However, the liability of any distributee shall not exceed "the value of his distributive share as of the time of the distribution."⁹⁶ Each distributee shall have the right of contribution but must protect that right by notice to the other distributees of the demand made on him in sufficient time to permit the other distributees to participate in the suit.⁹⁷ The right of any claimant to proceed against any distributee is barred either 3 years after the death of the decedent or 1 year after the closing statement is filed, whichever occurs later.⁹⁸

5. Bond Requirements

Except where excused by the terms of the will, former Indiana Code section 29-1-11-1 required the personal representative to file a bond before entering upon the duties of his office; the expense of the bond, however, was borne by the estate.⁹⁹ To minimize expenses in the administration of estates, the 1975 legislature amended this section by providing that no bond shall be required unless the will provides for the execution and filing of a bond by the personal representative or the court finds, on its own motion or on petition by an interested person, that the bond is necessary to protect the creditors, heirs, devisees, or legatees.¹⁰⁰

⁹³*Id.* § 29-1-7.5-4(b). This section is patterned after Uniform Probate Code section 3-1005.

⁹⁴IND. CODE § 29-1-7.5-6 (Burns Supp. 1975). This section was patterned after Uniform Probate Code section 3-1005.

⁹⁵IND. CODE § 29-1-7.5-5 (Burns Supp. 1975). This section adopts the language of Uniform Probate Code sections 3-1004.

⁹⁶IND. CODE § 29-1-7.5-5 (Burns Supp. 1975).

⁹⁷*Id.*

⁹⁸*Id.* § 29-1-7.5-7.

⁹⁹*Id.* § 29-1-11-1 (Burns 1972), *as amended id.* § 29-1-11-1 (Burns Supp. 1975).

¹⁰⁰*Id.*

6. Appraisement of Property

Previous law required a verified appraisement of all the decedent's property.¹⁰¹ Under the Act, the personal representative has only to prepare "a verified written inventory in one or more written instruments, indicating the fair market value of each item" of the decedent's property.¹⁰² However, the Act gives the personal representative the discretion to employ a disinterested appraiser; and, contrary to prior law, the personal representative may employ different appraisers to appraise different assets.¹⁰³ The new law also provides that the personal representative may furnish any interested person with a copy of the inventory or any supplement or amendment to it as an alternative to filing a copy with the court.¹⁰⁴

XX. Workmen's Compensation*

A. Routine Course of Employment

During the period covered by this survey, two significant Second District Court of Appeals cases, *Estey Piano Corp. v. Steffen*¹ and *Rivera v. Simmons*,² involved the issues of compensability pursuant to Indiana's Workmen's Compensation Act³ for an injury incurred during the normal and routine course of employment. Based on very similar fact situations, the court approved the Industrial Board's determination to grant compensation in *Estey* and to deny compensation in *Rivera*.

To qualify for workmen's compensation, the employee's injury must result from an accident arising out of employment.⁴ Accident is "any unlooked-for mishap or untoward event not expected or designed by the one who suffers the injury."⁵ The two

¹⁰¹*Id.* § 29-1-12-1 (Burns 1972), as amended *id.* § 29-1-12-1 (Burns Supp. 1975).

¹⁰²*Id.* § 29-1-12-1(a) (Burns Supp. 1975).

¹⁰³*Id.* § 29-1-12-1(b).

¹⁰⁴*Id.* § 29-1-12-1(c).

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¹328 N.E.2d 240 (Ind. Ct. App. 1975).

²329 N.E.2d 39 (Ind. Ct. App. 1975). *Rivera* was decided less than one month after *Estey*.

³IND. CODE §§ 22-3-2-1 *et seq.* (Burns 1974).

⁴*Id.* § 22-3-2-2. See generally 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.20 (1973) [hereinafter cited as LARSON].

⁵Heflin v. Red Front Cash & Carry Stores, 225 Ind. 517, 522, 75 N.E.2d 662, 664 (1947).

ingredients of an accident are unexpectedness and definiteness.⁶ The only theoretical controversy regarding the requirement of an accident is whether the two elements of unexpectedness and definiteness are applied to the cause of the injury resulting to the employee or to the injury itself.⁷ If the unexpectedness and definiteness tests are applied to the cause of the injury, compensation is less likely to be allowed than when these elements are applied to the injury itself. In determining whether an accident arose out of employment, courts phrase their findings in terms of causation. The degree of causation required by different jurisdictions ranges from a liberal test that the injury can arise from anything in the employment to a strict test that the injury must arise out of an increased risk to the employee.⁸

The employee in *Rivera* incurred a herniated intervertebral disc while lifting a 90-pound die. He had been lifting dies of comparable weight for six years. In *Estey* the injured employee had worked for ten years at sanding piano parts. While lifting a 27-pound piano keyboard, she ruptured a lumbar disc. The employee had been sanding keyboards for one and one-half months prior to the injury; at the outset of this period, she had complained of a back ailment.

In *Estey* all three judges concurred in the result. Presiding Judge Sullivan and Judge Buchanan wrote opinions. Judge Sullivan dealt summarily with the accident requirement by holding that the employee's sharp pain while lifting a piano keyboard constituted an accident.⁹ The element of unexpectedness was thus applied here to the injury itself. In the remainder of his opinion, Judge Sullivan discussed the "arising out of employment" requirement. He subscribed to the position that "an accident arises out of employment when there exists some causal nexus between the injury complained of and the duties or services performed."¹⁰ Judge Buchanan argued strongly that the requirement of an accident should not be so easily satisfied. He stated that the mere fact of being employed at the time of a disability is not sufficient to find an accident.¹¹ However, Judge Buchanan concurred in

⁶1A LARSON § 37.20, at 7-3, 7-4. Of these two ingredients, unexpectedness is considered the trademark of an accident. *Id.* at 7-3.

⁷*Id.* at 7-4.

⁸1 LARSON § 6-20. An additional issue with the "arising under" requirement emerges where the employee brings a condition or disease to the employment. The court then must also decide whether the injury is the result of the employment or follows as the natural consequence of the pre-existing condition. *Id.* § 12.20.

⁹328 N.E.2d at 243. (Sullivan, P.J.).

¹⁰*Id.*

¹¹*Id.* at 246 (Buchanan, J.).

the result because the Industrial Board found that the lifting of the keyboard constituted the necessary extra exertion for an accidental injury.¹² Judge Buchanan evidently would prefer that the unexpectedness element be applied to the cause of the injury.

In *Rivera* all three judges again concurred in the result, and all three wrote opinions. Judge Buchanan prefaced his opinion with the observation that an employee cannot receive compensation unless "he specifically shows some increased risk or hazard present in his employment which caused the injury."¹³ He noted that the employee was not engaged in any unusual or extraordinary employment duty. Although Judge Buchanan apparently was concerned with the lack of causation, he concluded that the employee did not sustain an accident because there was no unexpected event which caused his injury.¹⁴ This commingling of accident and causation concepts does not lend itself to a clear and precise analysis of workmen's compensation cases.

Judge White stated that the sudden onset of severe pain is an unexpected event which qualifies as an accident.¹⁵ Although Judge White was quick to find an accident, he concurred in the result because there were no findings of facts which would "lead inevitably to the conclusion that Rivera's injury arose out of his employment."¹⁶ Presiding Judge Sullivan clearly stated in his opinion that he disagreed with the standard Judge Buchanan applied in determining that there was no accidental injury. He also stated that Judge Buchanan was wrong in believing that an injury sustained as a result of routine work could not be compensated.¹⁷ Yet, Judge Sullivan concurred in the result.

¹²*Id.* at 245.

¹³329 N.E.2d at 41 (Buchanan, J.).

¹⁴*Id.* at 43.

¹⁵*Id.* at 44. Judge White, concurring, wrote: "[T]he onset of pain, especially the sudden onset of severe pain, is an untoward event and most certainly is an 'accident' so far as the person who suffers the pain is concerned."

¹⁶*Id.*

¹⁷*Id.* Presiding Judge Sullivan stated:

My concurrence here is made in the full belief that the Board in this case applied an erroneous standard in determining "that there was no untoward event, injury, accident or accidental injury to plaintiff while employed by defendant."

It is apparent to me that the Board reasoned as did Judge Buchanan in *Estey*, that an injury sustained as a result of "usual, customary and routine work" could not be compensable. As stated in *Estey*, . . . I do not think such to be the law in Indiana at this time.

(Emphasis in original).

B. Willful Employee Misconduct

In *Motor Freight Corp. v. Jarvis*,¹⁸ the Second District Court of Appeals affirmed the Industrial Board's award of compensation to the employee. The employee, Jarvis, drove a tractor-trailer unit owned by his employer, Motor Freight Corporation (MFC), from Indianapolis, Indiana, to Chillicothe, Missouri. After the delivery of the trailer unit, MFC informed Jarvis that he was needed at home because his wife was ill. With only a three and one-half hour layover, Jarvis began his return trip to Indianapolis. He was injured in an accident and claimed benefits as a result of his injuries. MFC denied liability on the grounds that Jarvis had committed willful acts of misconduct in violation of Indiana Code section 22-3-2-8.¹⁹ The specific acts of misconduct against Jarvis were the commission of a misdemeanor, the willful failure to obey a written rule of the employer, and the willful failure to perform a duty required by statute. All three acts of misconduct were grounded upon Jarvis' violation of a federal regulation requiring an 8-hour rest period between every 10 consecutive hours of duty.²⁰

The court of appeals affirmed the Industrial Board's finding that MFC's knowledge and acquiescence in Jarvis' conduct and Jarvis' lack of knowledge of the federal regulation would defeat the defense of employee misconduct. The court also supported the Industrial Board's finding that there was insufficient proof that Jarvis' conduct proximately caused his injury.

Although the defense asserted by MFC conformed to traditional notions of employee misconduct,²¹ it is difficult to justify denying compensation to an employee pursuant to a state's workmen's compensation act if he violates a separate federal regulation. This is especially true since the Indiana Workmen's Compensation Act does not provide for penalties to an employer if he

¹⁸324 N.E.2d 500 (Ind. Ct. App. 1975).

¹⁹IND. CODE § 22-3-2-8 (Burns 1974). The section provides as follows: No compensation shall be allowed for an injury or death due to the employee's intentionally self-inflicted injury, his intoxication, his commission of a felony or misdemeanor, his wilful failure or refusal to use a safety appliance, his wilful failure or refusal to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his wilful failure or refusal to perform any statutory duty. The burden of proof shall be on the defendant.

²⁰49 C.F.R. § 395.3 (1974) (U.S. Department of Transportation regulation).

²¹See B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 11-1 (1950).

violates a statute, even where such violations might result in a benefit to the employer.²²

C. Aggravation

In *Noble County Highway Department v. Sorgenfrei*,²³ the Second District Court of Appeals affirmed an award of compensation for the death of an employee who died as a result of the combined effects of an industrial accident and latent leukemia. The employee was injured on May 14, 1969. On January 29, 1970, the employee discovered that he had leukemia; on February 12, 1970, the employee died. The Industrial Board followed the medical testimony in holding that the leukemic condition was aggravated by the industrial accident and that a combined effect of the industrial accident and leukemia hastened the employee's death. The court stated that the employee's death was a proximate result of his industrial injury and it made no difference whether the hastened death was viewed as a "combination" or "aggravation" case.²⁴ The court based its decision on medical testimony, which was considered sufficient to satisfy the causal connection requirement contained in the "arising out of" portion of the Workmen's Compensation Act.²⁵ This analysis conforms to the normal rule that the employer takes the employee as he finds him.²⁶

²²For an example of an employer's violation of a statute resulting in a benefit to him see Vargo, *Workmen's Compensation, 1974 Survey of Indiana Law*, 8 IND. L. REV. 289, 294-95 (1974).

²³321 N.E.2d 766 (Ind. Ct. App. 1975).

²⁴See generally B. SMALL, *supra* note 21, §§ 6.20-.21.

²⁵IND. CODE § 22-3-2-2 (Burns Supp. 1975). See LARSON § 7.4.

²⁶LARSON § 12.20, at 3-249.

